Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2004

ROBERT A. BURT, ET AL.,

Petitioners,

v.

DONALD H. RUMSFELD, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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April 26, 2005

TABLE OF CONTENTS

Page

RULING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DKT.NO. 34] AND DEFENDANT'S MOTION TO DISMISS [DKT. NO. 12] A-1

JUDGMENT B-1

RULING ON DEFENDANT'S RULE 12(B)(1) MOTION TO DISMISS C-1

NOTICE OF APPEAL D-1

SOLOMON AMENDMENT E-1

CONSTITUTION OF THE UNITED STATES—AMENDMENT I F-1

CONSTITUTION OF THE UNITED STATES—AMENDMENT V G-1

LUSTIG-PREAN AND BECKET V. THE UNITED KINGDOM, APP. NOS. 31417/96, 3277/96 (EUR. CT. OF HUMAN RIGHTS, THIRD SECTION, 1994) H-1

APPENDIX A

RULING ON
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT [DKT.NO. 34]
AND
DEFENDANT'S MOTION TO DISMISS
[DKT. NO. 12]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT A. BURT, ET AL, PLAINTIFFS,	:	CIVIL ACTION NO. 3-03-cv-1777 (JCH)
v.	:	
DONALD H. RUMSFELD, IN HIS OFFICIAL CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANT.	:	JANUARY 31, 2005

RULING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DKT.NO. 34] AND DEFENDANT'S MOTION TO DISMISS [DKT. NO. 12]

I. INTRODUCTION

Members of the Yale Law School faculty[1] (hereinafter the "Faculty")[2] together with *pro se* plaintiff

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[1] Professors Robert A. Burt, Owen M. Fiss, Harold Hongju Koh, Kenji Yoshino, Bruce Ackerman, Anne L. Alstott, Ian Ayres, Jack M. Balkin, Yochai Benkler, Richard R.W. Brooks, Amy L. Chua, Morris L. Cohen, Dennis E. Curtis, Harlon L. Dalton, Drew S. Days III, Brett Dignam, Steven B. Duke, William N. Eskridge, Jr., Daniel C. Esty, Daniel J. Freed, Robert W. Gordon, Michael J. Graetz, Oona A. Hathaway, Dan M. Kahan, Paul W. Kahn, Jay Katz, S. Blair Kauffman, Alvin K. Klevorick, Anthony T. Kronman, Carroll L. Lucht, Daniel Markovits, Jerry L. Mashaw, Jean Koh Peters, Robert C. Post, J.L. Pottenger, Jr., Judith Resnik, Carol M. Rose, Susan Rose-Ackerman, Vicki Schultz, Reva Siegel, John G. Simon, Robert A. Solomon, Stanton Wheeler, and Stephen Wizner.

[2] According to the Yale University Faculty Handbook, the faculty of each school within the University, including the law school, have the authority to set educational policies within their school. See Burt Decl. at Ex. A. Thus, when the faculty set, amended, and then suspended its Non-Discrimination Policy, it did so as the governing body of the law school.

YLS Professor Jed Rubenfeld ("Rubenfeld"),[3] have brought *this action against Donald H. Rumsfeld, in his official* capacity as the United States Secretary of Defense ("DoD" or the "Government"). This action arises out of DoD's application of the Solomon Amendment against Yale University as a result of a YLS non-discrimination policy.[4]

The Faculty, including Professor Rubenfeld, claim that the Law School is not in violation of the Solomon Amendment, codified at 10 U.S.C. § 983 (2004), which requires educational institutions to allow military recruiters access to their campuses and their students as a condition of receipt of most federal funds. They argue that YLS' recruiting programs occur off-campus and are thus beyond the scope of the Solomon Amendment. They also claim that military recruiters have the same opportunity to become eligible for the official recruiting programs, and therefore YLS is neither "effectively preventing" military recruiters from accessing YLS students through the programs, nor treating military recruiters different from non-military recruiters.

Alternatively, even if YLS is in violation of the Solomon Amendment, the Faculty argue that the court should declare the Solomon Amendment as applied unconstitutional

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See Burt Decl. at ¶ 5. Therefore, the voting majority of faculty members that make up the plaintiff group are coextensive with the law school itself with regard to the issues in this case. The court will sometimes use the terms "Law School" and "YLS" interchangeably in this Ruling in referring to the plaintiffs.

[3] On May 3, 2004, the court granted the Motion For Withdrawal of Counsel [Dkt. No. 39] allowing the attorneys for the other plaintiff faculty members to withdraw from representing Professor Rubenfeld. He now appears *pro se*.

[4] Several student groups have filed a related civil suit alleging that the Solomon Amendment also violates their constitutional rights. See Student Members of SAME v. Rumsfeld, No. Civ. A. 3:03-cv-1867 (JCH).

because it places unconstitutional conditions on hundreds of millions of dollars of government funding granted to Yale University. By compelling them to officially aid the military's recruiting efforts, the Faculty claim that the Solomon Amendment violates their freedoms of speech and association and violates their substantive due process right of educational autonomy. Specifically, the Faculty argue that forced inclusion of military recruiters in YLS' official recruiting process compels them to communicate a significantly different message concerning employment discrimination than they choose to send, and that it forces them to associate with individuals whose publicly acknowledged beliefs are in conflict with those of YLS. Additionally, the Faculty argues that forced inclusion of military recruiters interferes with their substantive due process right to educational autonomy in creating an educational atmosphere at YLS that is free from discrimination and protects all YLS students.

Professor Rubenfeld advances a slightly different constitutional claim. He eschews the Faculty's freedom of association and educational autonomy claims. He presses only a First Amendment compelled speech claim. Unlike the Faculty's claim that inclusion of military recruiters compels them to change their message, Rubenfeld argues that the Government compels him to aid in the dissemination of the Government's speech. Rubenfeld argues that compelling him to help disseminate another's speech is a violation of his First Amendment rights.

DoD opposes the summary judgment motion. It argues first that Yale University, not the Faculty, is the proper party to bring these claims. DoD also claims that, absent final agency action by the proper decision-maker at DoD, the Faculty's claims are not ripe for judicial review. If the suit is not to be dismissed on standing or ripeness grounds, DoD then argues that YLS is in violation of the Solomon Amendment because YLS has a practice which

effectively prevents the military from participating in the YLS' official recruiting programs. Finally, DoD claims that the Solomon Amendment is a constitutional assertion of Congress's spending power and violates no constitutional rights.

In January 2004, DoD moved to dismiss YLS' claims for lack of standing and ripeness under FED. R. CIV. P. 12(b)(1) and its constitutional claims for failure to state a claim upon which relief could be granted under FED. R. CIV. P. 12(b)(6). On June 9, 2004, the court denied DoD's Rule 12(b)(1) motion. Burt v. Rumsfeld, 322 F.Supp. 2d 189 (D.Conn. 2004). The court held that the Faculty had suffered a constitutionally cognizable injury-in-fact when they, as the governing body of YLS, were forced to suspend its non-discrimination policy under the threat of government withdrawal of hundreds of millions of dollars of funding for sister schools within Yale University, and that the injury implicated legally protected First and Fifth Amendment rights. Additionally, the court held that the plaintiffs' claims were primarily legal in nature, that the threatened loss of funding constituted concrete and potentially catastrophic harm, and that the years of communications between the parties fleshed out the issue sufficiently for effective judicial review. Refusing to interpret "ripeness" as requiring that YLS live under a perpetual sword of Damocles, the court found the plaintiffs' claims ripe for review.[5] However, the court reserved decision on DoD's Rule 12(b)(6) motion and will address that aspect of DoD's Motion to Dismiss in this Ruling.

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[5] The court notes that at oral argument in December 2004, Government's counsel stated that DoD had yet to make a "final" determination, despite the passage of more than three years since the issue first arose and of nearly a year since Yale University provided the last requested information to DoD.

The Faculty has now moved for summary judgment on all of their claims, arguing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Professor Rubenfeld joins in that Motion on the claims pressed by him.

DoD counters that, to the extent the court does not dismiss the plaintiffs' constitutional claims under DoD's previous Rule 12(b)(6) motion for failure to state a claim, the court cannot grant summary judgment in favor of the plaintiffs because there are material facts in dispute. Specifically, it asserts a claim pursuant to Federal Rule 56(f) that it will become able to create material issues of fact upon the completion of its requested discovery.

II. STANDARD OF REVIEW

A. Rule 56(a) Summary Judgment Standard

The burden is on a party moving for summary judgment to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); White v. ABCO Eng'g Corp., 221 F.3d 293, 300 (2d Cir. 2000). When a motion for summary judgment is supported by documentary evidence and sworn affidavits, the nonmoving party must present significant probative evidence to create a genuine issue of material fact. See Liberty Lobby, 477 U.S. at 249-50. A court must grant summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact . . . .'" Miner v. Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson, 477 U.S. at 248).

The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991); see also Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992). A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements, see Securities & Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978), nor may he rest on the "mere allegations or denials" contained in his pleadings, Goenaqa v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995); see also Yinq Jinq Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (holding that a party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible). Further, a party may not rely "on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986).

The Local Rules of this court also address the obligation of the parties with regard to a motion for summary judgment: "All material facts set forth in said Local Rule 56(a) statement will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2." Local Rule 56(a) (1) (D.Conn.)

B. DoD's Discovery Requests Pursuant to Rule 56(f)

DoD has asserted repeatedly in its opposition pleadings and at oral argument that DoD requires extensive discovery in order to oppose plaintiffs' summary judgment motion. DoD requested discovery in the footnotes of its

summary judgment opposition brief and in the "Disputed Issues of Material Fact" section of its Local Rule 56(a)(2) filing, in place of the required list of material facts in dispute. See Def's Local Rule 56(a)(2) Statement at 7-9 [Dkt. No. 42] ("Def s Local Rule 56"). DoD also requested discovery in an additional, twenty-three page filing requested by the court in an attempt to bring specificity to DoD's previous requests. See Supplemental Declaration of Alan S. Modlinger [Dkt. No. 66] ("Supp. Modlinger Decl."). However, the court finds that discovery is not warranted.

This court is conscious of the principle that the grant of summary judgment prior to discovery is not to be undertaken lightly. See, e.g., Hellstrom v. U.S. Dept. of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (district court may grant summary judgment without discovery "[o]nly in the rarest of cases"); Trebor Sportswear Co., Inc. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303-04 (2d Cir. 2003). However, when a party "fails to produce any specific facts whatsoever to support [their case], a district court may, in its discretion, refuse to permit discovery and grant summary judgment." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981) (dismissing plaintiff's conspiracy allegation without discovery). "An opposing party's mere hopes that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of [a summary judgment motion]." Id. at 107 (quotation omitted). The object of discovery is not to find out *if a* party has a claim or defense, but to develop a factual basis for its claim or defense. See Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

Also insufficient to justify a denial of summary judgment under Rule 56(f) are "bare assertion[s] that the evidence supporting a [party's] allegation is in the hands of the [other party]." Contemporary Mission, 648 F.2d at 107

(quotation omitted); see also Paddington Partners, 34 F.3d at 1138. A party cannot rely upon Rule 56(f) "where the result of a continuance to obtain further information would be wholly speculative." Contemporary Mission, 648 F.2d at 107. A court may properly deny a discovery request pursuant to Rule 56(f) "if it deems the request to be based on speculation as to what *potentially could be* discovered." Paddington Partners, 34 F.3d at 1138. (emphasis added).

The Second Circuit has developed a four-part test for district courts to use when ruling on a party's request for discovery under Rule 56(f). Sage Realty Corp. v. Ins. Co. of North America, 34 F.3d 124, 128 (2d Cir. 1994).

> Rule 56(f) requires the opponent of a motion for summary judgment who seeks discovery to file an affidavit explaining: (1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful.

Id.; see also Burlington Coat Factory Warehouse Corp. v. Esprit de Corp, 769 F.2d 919, 926 (2d Cir. 1985). "Additionally, the discovery sought must be material to the opposition of the summary judgment motion." Sage Realty, 34 F.3d at 128.

DoD's initial attempts at requesting discovery, found in its opposition to the plaintiffs' summary judgment motion and its Local Rule 56(a)(2) statement, assert no facts at all. See, e.g., Def's Local Rule 56 at 7-9. DoD merely points out the plaintiffs' factual allegations and requests a broad range of discovery to determine to what extent these allegations are true. See, e.g., Def's Local Rule 56(a)(2) Statement at Ex. A,

¶¶ 10-14 ("Modlinger Decl."); see also Mem. Opp. Summ. J. at 21 n.7.[6]

During a teleconference on November 29, 2004, the court asked DoD to file another discovery document in an attempt to allow DoD to address more specifically how the requested information was to be obtained and the relationship between its requests and any material facts.

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[6] For example, paragraph 12 of the Modlinger Declaration reads:

> With respect to the message that plaintiffs intend to send, defendant would require discovery from the plaintiff faculty members to establish whether, among the forty-five individual faculty members in this lawsuit, there is, in fact, any particularized message underlying the treatment of military recruiters at Yale Law School, and if so, what that message is. Plaintiffs here have submitted declarations from only three of the forty-five members who claim injury to their First Amendment rights and whose intent is therefore relevant to this lawsuit. Defendant would require discovery (including depositions) concerning the intended message from a broader sample of the plaintiff group, especially given that in the context of this litigation it has become clear that the faculty members are hardly united; one faculty member has withdrawn from the principal plaintiff group because he disagrees with its positions in this litigation, see Memorandum of Law in Support of Plainitiffs' Motion for Summary Judgment (filed by Plaintiff Jed Rubenfeld) at 1, and another faculty member has now sought to join the litigation several months after the complaint was filed, see Stipulation and Order of April 8, 2004. To the extent that plaintiffs have purported to submit to the Court documentary evidence concerning the faculty's intent with respect to its treatment of military recruiters, see Declaration of Robert A. Burt, Ex. I, defendant would seek to investigate the factual background concerning that document. Specifically, defendant would seek discovery (including document requests and depositions) from Yale University, Yale Law School, and its faculty, concerning meetings and discussions among faculty members and administrators at Yale Law School and Yale University with respect to the intent underlying decisions regarding military recruiters' access to the facilities and services of CDO.

When combined, DoD's Local Rule 56(a)(2) Statement and the Supplemental Modlinger Declaration fail to pass the four-part discovery test laid out by the Second Circuit in Sage Realty and are insufficient to warrant discovery under Rule 56(f). First, DoD's Rule 56(f) Statement and discovery requests fail to explain what *specific* information is sought. Instead, the government either 1) reiterates factual assertions made by the plaintiffs, see, e.g., Modlinger Decl. at ¶ 10, and requests discovery apparently aimed at seeing to what extent these claims are true, or 2) lists broad topic areas the government wishes to explore, many of which are not material facts, see, e.g., Supp. Modlinger Decl. at ¶ 5(g)(v).[7] The court finds these requests to be "based on speculation as to what *potentially could be* discovered." Paddington Partners, 34 F.3d at 1138 (emphasis added). As the Second Circuit has noted, "[w]hile Rule 56(f) discovery is specifically designed to enable a [party] to fill material evidentiary gaps in its case . . . it does not permit a [party] to engage in a 'fishing expedition'." Id. (citation and quotation omitted). DoD apparently seeks to embark on just such an expedition.

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[7] Paragraph 5(g)(v) reads:

> Defendant anticipates that it will take deposition of the following (via subpoena where necessary): . . . [w]itnesses from Yale Corporation, Yale University, or Yale Law School who will be able to testify, pursuant to FED. R. CIV. P. 30 (b)(6), concerning the following subjects: . . . the manner in which policies are established and enforced at Yale Law School (including policies concerning non-discrimination and recruitment by legal employers), including the roles of Yale University (including trustees, officers, and administrators); Yale Law School (including trustees, officers, and administrators); the Career Development Office at Yale Law School; the faculty members at Yale Law School; students at Yale Law School; and student organizations at Yale Law School in establishing and enforcing such policies.

Secondly, DoD never alleges *any* material facts that its discovery is likely to support. Again, it relies on the vague concept that it requires discovery to negate the material facts supported by competent evidence submitted by the plaintiffs. Even with regard to these vague requests, DoD does not demonstrate "how a genuine issue of material fact will be raised" by the proposed discovery. See Sage Realty, 34 F.3d at 128.

For example, in both its original Local Rule 56(a)(2) Statement and in its supplemental statement, DoD requests information related to the issue of coercion involved in the plaintiffs' First Amendment claims. Specifically, DoD requests information concerning whether or not YLS was coerced by DoD's threats into suspending its Non-Discrimination Policy ("NDP") and allowing military recruiters to use YLS' Career Development Office ("CDO"). See, e.g., Supp. Modlinger Decl. at ¶ 5(g)(iv) (requesting deposition testimony regarding "the non-discrimination policy at Yale Law School, including its . . . suspension . . ., [and] the intent underlying its . . . suspension . . . ."); see also Modlinger Decl. at ¶ 10 (requesting "appropriate discovery with respect to plaintiffs' freedom of speech allegations" that "DOD has forced plaintiffs to send a 'very different message'" by "requiring that military recruiters be allowed access to CDO programs"). However, when pressed at oral argument on the need for discovery concerning coercion, counsel for DoD conceded the fact that the YLS involuntarily suspended its NDP because of DoD's threat to cut off funding to Yale University.[8] Tr. at 124.

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[8] Specifically, on at least six occasions at oral argument, the court asked defense counsel what possible information he could expect to elicit through deposition testimony that would put the material fact of coercion at issue. The court repeatedly gave counsel leeway to engage in pure speculation. Defense counsel could not respond with even a single

DoD does not satisfy the first and second prongs of Sage Realty when it seeks discovery unrelated to material facts or requests a fishing expedition in the speculative hope that the facts put forth by the plaintiffs might be shown to be untrue.

With respect to prongs three and four of the Sage Realty test, it is important to note that while discovery was not stayed by order of the court, the court does not find DoD unreasonably failed to make efforts to obtain discovery. The court's posture regarding discovery could reasonably have been interpreted as a *de facto* stay. However, that does not now justify unwarranted discovery or excuse DoD's failure to come forward with evidence within its own control.

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speculative assertion prior to conceding the fact. Tr. at 108-11, 118-20, and 122.

The colloquy ended as follows:

THE COURT: So the answer to my question is you have not identified any discovery you need on the question of whether there's a forced speech here. Is that fair to say, sir?

MR. MODLINGER (ATTORNEY FOR DEFENDANT): Let me look at my –

THE COURT: That calls for a yes or no answer to my question.

MR. MODLINGER: Your Honor, we indicated that we required discovery that doesn't fit with relationship to the narrow tailoring point.

THE COURT: Sir, that isn't my question. My question is, is the discovery on the sole fact of whether there is force applied here by governmental action causing the plaintiff to act in the way it doesn't want to act with respect to its First Amendment rights. I'm not on the other elements.

MR. MODLINGER: I did not understand that before. I apologize. With respect to that claim, I believe I'm not aware of any discovery that we would need with respect to that particular claim.

Tr. at 123-24.

Much of what DoD requests through discovery concerns information reasonably within its own control. For example, DoD asks to depose no fewer than 23 witnesses concerning such topics as what facilities, services, and accommodations YLS made available to military recruiters, see Supp. Modlinger Decl. at ¶ 5(g)(l); how military recruiters were treated differently than non-military recruiters, see id. at ¶ 5(g)(iii); and what contracts the federal government gave to Yale, and how that money was used, see id. at ¶ 5(g)(viii). Presumably military personnel who recruited at YLS know what they were and were not allowed to do, where they were and were not allowed to go, and what services, if any, YLS provided for them. Further, military recruiters know how they were treated when they visited YLS, and know if that treatment differed from what was afforded to other recruiters.[9] Finally, the United States Government, the provider of grants to universities across the nation, knows how much money it provides to Yale University and what programs are funded with that money. Surely, DoD can obtain this information from the other agencies and departments of the federal government, of which it is a part.

DoD also failed to come forward with knowledge within its control when it denied the Faculty's Statement of Material Facts. For example, DoD stated that it "lacked sufficient knowledge or information to admit or deny" whether a student hired by the military as an intern in 2003 initiated contact with the military, or whether military recruiters contacted the student. Def's Local Rule 56 at 6, ¶ 49. An employer has access to information concerning how

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[9] The court does not mean to suggest DoD might not obtain, through discovery of YLS, further evidence on this subject. However, it is indisputable that DoD has evidence on these subjects which it could have brought forth in response to the plaintiffs' summary judgment motion and did not.

it hired an employee. As a member of the Armed Forces, the recruiter works for DoD, and it is within DoD's control to ask the recruiter who hired the employee for this information.

DoD also claimed that it "lacked sufficient knowledge or information to admit or deny" whether, prior to 2002, military recruiters were: denied access to the CDO because they would not sign the NDP, see id. at 3, ¶ 18 and 5, ¶ 38; permitted to appear on the CDO website without signing the NDP, see id. at 3, ¶ 22; or permitted to meet with students or student groups on campus at the invitation of students or student groups, regardless of whether the military recruiters had signed the NDP, see id. at 4, ¶ 27. Additionally, DoD claimed it lacked sufficient knowledge to admit or deny whether, beginning in 2002, military recruiters were permitted to participate in the Fall Interview Program ("FIP") and Spring Interview Program ("SIP") because the NDP had been suspended. See id. at 6, ¶ 45. This is all information that military recruiters would have to have, based on their personal experiences with YLS. Even a *de facto* stay of discovery does not excuse a party from coming forward, in response to a motion for summary judgment, with information within its control.

DoD has thus failed to satisfy the Sage Realty test. DoD's request for discovery pursuant to Rule 56(f) is therefore denied.

The Government's refusal to come forward with information within its control or its denial of facts without supporting evidence has consequences under this District's Local Rule 56. The court will treat as fact for the purposes of this motion for summary judgment the following: 1) any Local Rule 56(a)(1) fact that is admitted or conceded by the defendant; and 2) any Local Rule 56(a)(1) fact offered by the

plaintiffs that DoD failed to rebut or claimed insufficient knowledge of, despite information being within its control.[10]

III. BACKGROUND

A. Yale Law School's Non-Discrimination Policy

Yale Law School enacted a non-discrimination policy in 1972. That policy barred discrimination on the basis of religion, race, sex, and national origin. See Plaintiffs' Local Rule 56(a)(1) Statement of Material Facts at ¶ 7 ("Pls' Local Rule 56"); Defendant's Local Rule 56(a)(2) at ¶ 7 (deem. adm'd). Since 1978, YLS has also prohibited discrimination on the basis of sexual orientation. See Pls' Local Rule 56 at ¶ 8; Def's Local Rule 56 at ¶ 8 (deem. adm'd). YLS' NDP, which applies to all aspects of YLS life, provides that YLS is committed to opposing:

> discrimination on the grounds of age; color; handicap or disability; ethnic or national origin; race; religion; religious creed; gender (including discrimination taking the form of sexual harassment); marital, parental or veteran status; sexual orientation; or the prejudice of clients.

See Pls' Local Rule 56 at ¶ 9; Def's Local Rule 56 at ¶ 9. Prior to the suspension of the NDP in 2002, employers who refused to certify their compliance with it were barred from school-sponsored recruiting services offered through the CDO. See Pls' Local Rule 56 at ¶ 17; Def's Local Rule 56 at ¶ 17 (deem. adm'd).

The CDO is located on-campus. See Bryant Decl. at Ex. A.[11] Prospective employers seeking to participate in

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[10] When the court refers to a fact that falls into the second category, it will mark it with a parenthetical: "(deem. adm'd)"

YLS' official recruiting program must register with the CDO. See id. at ¶ 6. Once registered, employers send pertinent information to the CDO, and CDO employees communicate that information to YLS students via the Law School website. See Pls' Local Rule 56 at ¶¶ 21-22; Def's Local Rule 56 at ¶¶ 21-22 (deem. adm'd). Law students review these communications, sign up for interviews with employers of their choice, and submit resumes online. See Pls' Local Rule 56 at ¶ 23; Def's Local Rule 56 at ¶ 23 (deem. adm'd). Registered employers can also post job listings online through the CDO and download student resumes from the CDO database. See Pls' Local Rule 56 at ¶ 24; Def's Local Rule 56 at ¶ 24 (deem. adm'd). (DoD admits that employers can download student resumes).[12] DoD claims that in the last few years, between 79 to 100% of YLS students used the CDO for job searches. See Def's Amendment Mem. at 4.

B. The Solomon Amendment

According to DoD, "[s]ince the Vietnam War ... Congress has confronted 'disaffection' with regard to the military among some students and faculty at institutions of higher learning that impairs the ability of the military to recruit." Mem. Opp. Summ. J. at 3. In response, the Congress has passed numerous pieces of legislation over the years "[t]o encourage educational institutions to open their campuses to military recruiters" by prohibiting the "distribution of certain federal funds to institutions of higher learning that barred military recruiters from their campuses." Id. In 1995, in light of policies like the YLS NDP, and controversies over the presence of ROTC programs on

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[11] DoD agrees that the CDO is located on-campus. See Def's Mem. Further Opp. Summ. J. at 5 n.6 [Dkt. No. 63] ("Def's Amendment Mem.").

[12] DoD appears to adopt without dispute all of these CDO-related facts. See Def's Amendment Mem. at 3.

university campuses, Congress enacted the Solomon Amendment, now codified at 10 U.S.C. § 983. Among other things, the Solomon Amendment denies certain categories of federal funding to institutions of higher education that prevent military recruitment on campus. 10 U.S.C. § 983(b). On October 28, 2004, Congress amended the Solomon Amendment. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811 ("NDAA") (2004). The Amendment currently provides as follows:

> **(b) Denial of funds for preventing military recruiting on campus.**--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--
>
> (1)the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or
>
> (2)access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):
>
> (A) Names, addresses, and telephone listings.

> (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

10 U.S.C. § 983(b).

DoD's original interpretive regulations limited loss of funding to the particular part of the university ("subelement") found not to be in compliance. See 61 Fed. Reg. 7739, 7740 (Feb. 29, 1996). In other words, if a subelement of a university, like a law school, denied access to military recruiters, then only that subelement would lose funding, not the entire institution. Further, the Amendment initially implicated only Defense Department funding. See Mem. Opp. Summ. J. at 4. Law schools, unlike other subelements of a university, are not typically recipients of large amounts of federal funding.

In 1997, Congress extended the rule denying federal funds to apply to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation, as well as Defense. Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified at 10 U.S.C. § 983(d)(1). This extension threatened certain types of student aid, including Perkins Loans and work study funds.[13] However, the applicable regulations continued to cabin the consequences of a subelement's failure to grant access to military recruiters to that subelement itself, such that non-compliance did not affect the university as a whole. See id.

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[13] In the fall of 1999, Congress enacted further revisions to the Solomon Amendment protecting students of non-compliant university subelements. Funds "available solely for student financial assistance or related administrative costs" are now exempt from the Solomon Amendment. Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999).

In 1999, Congress also modified the statute's language to extend its applicability to any "institution of higher education (including any subelement of such institution)." 10 U.S.C. § 983(c)(2), as modified by Pub. L. No. 106-65, § 549(a)(1) (1999). Following this change, DoD adopted interim regulations, effective immediately, that defined an "institution of higher education" to include "all sub-elements of such an institution." Defense Federal Acquisition Regulation Supplement: Institutions of Higher Education, 65 Fed. Reg. 2056 (Jan. 13, 2000). The effect of this redefinition was that a violation in any part of the university would put federal funding for the entire university in jeopardy. 48 C.F.R. § 252.209-7005.

A 2004 amendment to the Solomon Amendment recently added, *inter alia,* the phrase "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer" to the end of subsection (b)(1), a phrase that had previously existed only as a safe harbor provision in the regulations. See, e.g., 32 C.F.R. § 216.4(c)(3). This provision makes equal treatment of military recruiters an affirmative duty, instead of a safe harbor, for educational institutions. DoD argued that the 2004 amendment required the plaintiffs to amend their complaint and required the court to allow DoD to file a motion to dismiss this second amended complaint.[14] However, there is no good reason to do so, and DoD offers none. The court requested and received additional briefing on the ramifications of the 2004 amendment. See Dkt. Nos. 63-65. Although the 2004 amendment undercuts some of the plaintiffs' statutory arguments,[15] the court finds that the

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[14] DoD asserted the right to file a new motion to dismiss based on the 2004 amendment during a teleconference on November 29, 2004.

[15] The plaintiffs have not taken the position that the 2004 amendment in any way inhibits the court's ability to decide the pending motions.

issues remain essentially the same. See, e.g., Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219, 230 n.10 (3d Cir. 2004) ("FAIR").[16] The issues have been fully briefed. The court will proceed to decide the pending motions.

C. Military Recruiting at YLS and the Suspension of the NDP

In light of Congress's policy concerning homosexual conduct in the Armed Forces, popularly known as the "Don't Ask, Don't Tell" policy, DoD has refused to certify its compliance with the Law School's NDP. As a result, under the NDP, DoD has been denied use of the CDO since 1978. Mem. Opp. Summ. J. at 6-7; see also Safriet Decl. at IT 6. Instead, the Law School has offered military recruiters open access to classrooms and other meeting spaces on campus for informational sessions and other recruiting activities, including interviews, at the invitation of a student organization; and open access to any student or student group to reserve a classroom or other meeting space for such a meeting at any time. See Pls' Local Rule 56 at ¶ 27; Def's

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[16] As the Third Circuit pointed out in FAIR, the court does not return to square one simply because a statute as amended disadvantages one of the parties in the same fundamental way as before. See 390 F.3d at 230 n.10 (quoting Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993)) (holding that several of FAIR's challenges to the Solomon Amendment were not mooted by the 2004 amendment merely because it disadvantaged the appellant in the same fundamental way). The basic issue has not changed, and the parties have had the opportunity to submit supplemental briefs on the 2004 Amendment. The 2004 Amendment alters the statute to add language previously found in the regulations, bringing it into line with DoD's original arguments. From the start, DoD has argued that YLS has an affirmative duty to provide access to military recruiters at least equal in quality and scope to that provided to non-military recruiters prior to the 2004 Amendment. See Supp. Mem. Opp. Summ. J. at 5.

Local Rule 56 at ¶ 27 (deem. adm'd); see also Safriet Decl. at ¶¶ 7-9. Additionally, the Law School makes contact information available to DoD, including students' names, hometowns and states, academic majors, and degrees received. See Pls' Local Rule 56 at ¶ 28; Def's Local Rule 56 at ¶ 28.

The current conflict between YLS and DoD began in 2001 when a DoD official fired the opening salvo of a several-year-long series of written exchanges between Yale and various DoD officials regarding the NDP. On December 17, 2001, Colonel Clyde J. Tate, III, U.S. Army, advised Yale University President Richard Levin that, "I understand that military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information at Yale University by a policy or practice of the Yale Law School." Robinson Decl. at Ex. A. Colonel Tate advised Levin that "current statutes deny the use of certain federal funds" to institutions of higher education with a policy or practice of denying military recruiting personnel entry to campuses, and stated that, "[t]his letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of Yale University as well as Yale Law School." Id. Finally, Colonel Tate advised that, "based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract." Id.

A series of letters and meetings ensued, with military officials repeatedly categorizing the YLS NDP as not in compliance with the Solomon Amendment. On May 29, 2002, Colonel Tate informed President Levin, "Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial."

Robinson Decl. at Ex. C; see also Pls' Local Rule 56 at ¶ 40; Def's Local Rule 56 at ¶ 40. To avoid this $300 million funding loss to Yale University, the YLS faculty voted in 2002 to approve a "temporary" suspension of the NDP.[17] See Pls' Local Rule 56 at ¶¶ 42-43; Def's Local Rule 56 at ¶¶ 42-43 (deem. adm'd); see also Burt Decl. at 21 and at Ex. I; Robinson Decl. at Ex. D.

Following the Faculty's suspension of the NDP requirement, YLS permitted military recruiters to use the CDO and participate in the Law School's formal recruiting programs, the Fall Interview Program ("FIP") and Spring Interview Program ("SIP"). See Pls' Local Rule 56 at ¶ 45; Def's Local Rule 56 at ¶ 45. The military gained access to the CDO website. See Pls' Local Rule 56 at ¶ 46; Def's Local Rule 56 at ¶ 46. During the 2002 FIP, one YLS student interviewed with a military recruiter. See Pls' Local Rule 56 at ¶ 47; Def's Local Rule 56 at ¶ 47. During the 2003 SIP, no students interviewed with a military recruiter. See Pls' Local Rule 56 at ¶ 48; Def's Local Rule 56 at ¶ 48. One student did secure a summer 2003 internship with the Army, though not through the FIP or SIP. See Pls' Local Rule 56 at ¶ 49; Def's Local Rule 56 at ¶ 49. During the FIP and SIP for 2003-2004, a total of five Law School students interviewed with military recruiters. See Pls' Local Rule 56 at ¶¶ 51-52; Def's Local Rule 56 at ¶¶ 51-52. To date, none has accepted employment with the military. See id.

Conflict between YLS and the military continued, however. In early 2003, the Army referred the controversy to the Department of Defense. On May 29, 2003, the Office of the Under Secretary of Defense issued a letter signed by

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[17] By the 2003 recruiting season, it appears that every law school that is part of a university receiving federal funding had suspended their non-discrimination policy as applied to military recruiters in order to avoid losing that federal funding. FAIR, 390 F.3d at 228.

William J. Carr, Acting Deputy Undersecretary for Military Personnel Policy, opining that YLS and, by implication, Yale University, are in violation of the Solomon Amendment. See Pls' Local Rule 56 at ¶ 50 (set forth in the Robinson Decl. at Ex. K (hereinafter referred to as the "Carr Letter")); Def's Local Rule 56 at ¶ 50. In this letter, Acting Deputy Undersecretary Carr specifically declared that the Law School, through its recruiting policy requiring that military recruiters sign the NDP or be excluded from the CDO, "sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that [YLS] permits to participate in its CDO programs." Id.

After setting forth the applicable law and regulations and DoD's interpretation, the Carr Letter explained that YLS was not complying with DoD regulations and was "in effect" preventing military recruiting on campus. Id. Carr further informed Yale that the NDP, despite its temporary suspension, "remains an obstacle to military recruiters and their ability to plan for, schedule, and gain access to Yale Law School students for the purpose of military recruiting." Id. As such, Carr concluded, "Yale's policy is in violation of federal law," and advised Levin, "it is my duty under law to recommend to the Principal Deputy Under Secretary of Defense for Personnel and Readiness that Yale University be determined ineligible for Department of Defense funding." Id. Carr gave notice that he would so recommend on June 29, 2003, "unless you advise me before that date of a change in policy sufficient to overcome the deficiencies outlined above." Id.

On October 16, 2003, forty-five YLS faculty members, constituting a voting majority of the YLS faculty, see Pls' Local Rule 56(a)(1) at ¶ 2; Def's Local Rule 56(a)(2) at ¶ 2 (deem. adm'd), filed the instant suit.

On December 23, 2003, the decision-maker for the Department of Defense for purposes of enforcement of the Solomon Amendment, Principal Deputy Under Secretary of Defense for Personnel and Readiness Charles S. Abell, see Am. Supp. Mem. Opp. Summ. J. at 1 [Dkt. No. 54], wrote to President Levin stating that, despite more than two years of correspondence, meetings, and negotiations, he still did not have enough information to make his decision. See Robinson Decl. at Ex. N. Principal Deputy Under Secretary Abell requested detailed answers to a series of questions to allow him to "assess [Yale's] proposal properly." Id. President Levin responded in detail by letter on January 16, 2004. See id. at Ex. O.

At oral argument on December 9, 2004, the Government reported that Principal Deputy Under Secretary Abell had not yet made his decision concerning Yale's compliance with the Solomon Amendment.

IV. DISCUSSION

A. Parties' Claims

The claims brought by the Faculty and those brought by Professor Rubenfeld are not coextensive. Both the Faculty and Professor Rubenfeld assert that YLS is in compliance with the Solomon Amendment, as amended. They argue that because the FIP and SIP occur off-campus, YLS' refusal to permit military recruiters access to CDO-run programs does not constitute denying military recruiters "access to campus" or "access to students on campus." Furthermore, the Faculty and Rubenfeld argue that, because the military is subject to the same YLS policy requiring employers to subscribe to the NDP in order to participate in the CDO recruiting program as every other employer, YLS is offering access to military recruiters that is "equal in quality and scope" to that granted to non-military recruiters because the military is welcome to sign the NDP and access the CDO.

Even if YLS does violate the Solomon Amendment, the Faculty then argue that the Solomon Amendment places an unconstitutional condition on hundreds of millions of dollars of federal funding given to Yale University. The Faculty argue that, because enforcement of the Solomon Amendment will cut off federal funding not reasonably related to military recruiting, it penalizes them for exercising their First Amendment rights. Such a penalty constitutes an unconstitutional condition on receipt of federal funds.

The Faculty claim the Solomon Amendment violates their First Amendment rights in two ways. First, the Faculty argue that, because the Solomon Amendment has compelled them to suspend the NDP and include military recruiters in the CDO recruiting process, they are being prevented from sending their chosen message -- that discrimination will not be tolerated -- and forced to convey a very different message -- that discrimination will be tolerated in certain circumstances. Additionally, the Faculty claim that the Solomon Amendment violates their First Amendment right to freedom of association by interfering with their right to disassociate from an entity, the United States military, whose explicit policies conflict with the institutional beliefs of YLS, as expressed in the NDP.

The Faculty also claim that the Solomon Amendment violates their substantive due process right to educational autonomy under the Fifth Amendment. They describe this right as the right "to banish discriminatory conduct from all of the Law School's activities in order to protect their students and to create the environment necessary to carry out the Faculty Members' educational mission." Faculty Mem. Supp. Summ. J. at 29 [Dkt. No. 35] ("Mem. Supp. Summ. J."). The Faculty argue that the caselaw recognizes "a faculty's autonomous governance of the [university's] educational environment," as a right implicit in the concept of ordered liberty. Id. at 30.

Professor Rubenfeld does not press a substantive due process claim and does not press freedom of association as a basis for his First Amendment claim. His compelled speech claim is slightly different from that of the Faculty. Professor Rubenfeld argues that DoD is violating the Faculty's First Amendment rights not by forcing the Faculty to send a message the Faculty does not want to send, but rather by compelling them to help disseminate DoD's recruiting message, a message with which Professor Rubenfeld and the rest of the Faculty disagree.

DoD opposes all of the plaintiffs' claims. It continues to argue that Yale University, and not YLS, is the proper party to bring suit and that, therefore, the plaintiffs lack standing to maintain this action.[18] Additionally, DoD again claims that because, after three years, it still has not made a "final" decision concerning Yale's status, the claims are not ripe. The court has already addressed DoD's standing and ripeness defenses, see Burt, 322 F.Supp.2d at 196-203, and it will not revisit those issues: it adheres to its prior decision.[19]

To the extent the plaintiffs' claims are justiciable, DoD next argues that YLS is in violation of the Solomon Amendment because the NDP acts as a barrier, keeping military recruiters from receiving access to YLS students equal in quality and scope to that given to other recruiters. DoD further argues that the Solomon Amendment does not impose an unconstitutional condition that violates the plaintiffs' First and Fifth Amendment rights, but is simply an

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[18] The court notes that the Solomon Amendment treats universities and their sub-elements as the same. See 10 U.S.C. § 983(b).

[19] Indeed, the passage of nearly eight more months without a "final" decision causes this court to consider whether DoD ever intends to reach that decision. Having obtained its objective by threatening to cut-off funds, there may be no reason for it to reach a final, and in its view only then justiciable, decision.

exercise of Congress's power under the Spending Clause. See U.S. CONST. art. 1, § 8, cl. 1.

B. YLS NDP Does Not Comply With the Solomon Amendment

The Faculty contend that YLS is in compliance with the terms of the Solomon Amendment, even in the Amendment's most-recently-amended form. In their Supplemental Memorandum concerning the effect of the October 2004 amendment on YLS' statutory compliance, the Faculty contend that the access granted to military recruiters is "equal in quality and scope" to that granted to non-military recruiters. See Mem. Further Supp. Summ. J. at 3 [Dkt. No. 64] ("Pls' Amendment Mem."). The Faculty argue that, because the military is merely subject to the same YLS policy as every other employer, YLS is offering "equal access." See Pls' Amendment Mem. at 3. First the Faculty contend that, "military recruiters are granted 'equal' access when nondiscrimination policies are equally applied to military and civilian employers."[20] Id. (citing Gay and Lesbian Law Student Ass'n v. Bd. of Trs., 673 A.2d 484 (Conn. 1996) and Lloyd v. Grella, 83 N.Y.2d 537 (1994)). They further contend that the NDP does not "prohibit, or in effect prevent" the military from gaining access to YLS students, because the system in place prior to the NDP's suspension, *i.e.*, the *status quo ante,* provided the military with pertinent student information; access to students via letter, phone, and email; the ability to book rooms at the off-campus recruiting venue; and the ability to meet with students on campus by invitation of any student. See id. at 4.

Additionally, Professor Rubenfeld asserts that at no time has YLS instituted a policy or practice that restricts

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[20] YLS points out that in the 1990s, when the Christian Legal Society failed to subscribe to the NDP, it was not permitted to use CDO services. See Pls' Amendment Mem. at 3.

" 'military recruiters' 'access to campuses' or 'access to students on campus.' " Rubenfeld Mem. Further Supp. Summ. J. at 2 [Dkt. No. 65] ("Rubenfeld Amendment Mem."). Recruiting interviews arranged through the CDO are held off campus at a local hotel, and therefore, according to Rubenfeld, YLS' refusal to permit military recruiters to participate in CDO programs without signing the NDP cannot violate the Solomon Amendment. See Rubenfeld Amendment Mem. at 2.

In response, DoD argues that the October 2004 amendment clarifies that YLS must grant military recruiters access to the CDO recruiting programs, or else its policy in effect prevents military recruiters from gaining access to students that is equal in quality and scope to that granted to other recruiters. See Def's Amendment Mem. at 4. DoD further argues that the "equal opportunity" to subscribe to the NDP does not meet the Solomon Amendment's requirement for equal "access." See id. Congress meant actual, substantive access, and military recruiters' inability to sign the NDP "'in effect' prevents" them from gaining equal access to students.[21] Id. at 4-5. Finally, DoD argues that Congress's repeated reference to "campuses" is merely meant to specify students who are enrolled at a given institution, not place a geographic boundary on the access afforded to military recruiters.

The court finds that YLS is not in compliance with the Solomon Amendment, as amended, when it conditions

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[21] The court questioned at oral argument why DoD could not sign the NDP since its "Don't Ask, Don't Tell" policy concerns conduct, see Able v. United States, 155 F.3d 628, 635 (2d Cir. 1998) (distinguishing Romer v. Evans, 517 U.S. 620 (1996) and City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), as involving status-based restrictions, instead of the conduct restrictions reviewed in Able)), not "sexual orientation." DoD demurred to this suggestion, and neither plaintiffs nor the defendant press any argument on this basis.

recruiting on subscription to the NDP. In addressing this claim, the court's analysis is controlled by the plain meaning of the statute. See United States v. Awadallah, 349 F.3d 42, 51 (2d Cir. 2003); see also United States v. Proyect, 989 F.2d 84, 87 (2d Cir.1993) ("[W]hen the language of the statute is clear, its plain meaning ordinarily controls its construction."). The Solomon Amendment plainly states that funding may be denied if an institution has a policy that "prohibits, or in effect prevents . . . [military recruiters] from gaining access to campuses, or access to students . . . on campuses . . . in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer . . . ." 10 U.S.C. § 983(b). It is undisputed that military recruiters are not allowed access to the CDO if they do not sign the NDP. Non-military recruiters that sign the NDP have access to the CDO. YLS' policy of requiring subscription to the NDP as a condition of participation in CDO recruiting programs clearly "in effect" prevents military recruiters from accessing students through the CDO.

The argument that the military has the opportunity to sign the NDP is unavailing. The statute does not say that military recruiters must have the same opportunity to comply with an institution's policies as non-military employers, nor does it say that military recruiters must have access to the same procedures as non-military employers in order to gain access to students. Congress could have easily drafted the Amendment to say either, but it did not. In arguing that YLS has not "prohibited" or "prevented" access as proscribed by the Solomon Amendment, see Pls' Reply Mem. in Further Supp. Summ. J. at 3-4 [Dkt. No. 52], the Faculty ignore other language in the Solomon Amendment that requires access to students to be "in a manner that is at least equal in quality and scope" to that given to other recruiters. See FAIR, 390 F.3d at 228 (after September 11, 2001, DoD began a policy of requiring not only access to campuses, but "treatment equal" to other recruiters). The statute clearly states that an institution's policies cannot prohibit or prevent military

recruiters from accessing campuses and students in a manner at least equal to other recruiters. In effect, the NDP does just that.

The fact that recruiting interviews take place off-campus does not eliminate the Solomon Amendment violation. The CDO is located on-campus. Prospective employers seeking to participate in YLS' official recruiting program must register with the CDO. Once registered, employers send pertinent information to the CDO, and CDO employees communicate that information to YLS students, via the Law School website. Law students review these communications, sign up for interviews with employers of their choice, and submit resumes, all online through the CDO. Registered employers can also post job listings online through the CDO and download student resumes from the CDO database. In order to participate in YLS' official recruiting program, an employer must have access to the CDO and its computers, and these are part of the YLS campus. To prevent military recruiters from accessing the CDO and its programs is to deny military recruiters access to a part of Yale's campus.

In sum, YLS may offer military recruiters the same opportunity as non-military recruiters to comply with its policy regarding subscription to the NDP, but that policy "in effect prevents" military recruiters from gaining access to campus and students on campus "at least equal in quality and scope" to that afforded other recruiters. Therefore, under the plain meaning of the Solomon Amendment, YLS is not in compliance with the Solomon Amendment. The plaintiffs' motion for summary judgment on its statutory claim is therefore denied.

It is the view of this court that both sides have had "a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried" on the plaintiffs' statutory claim. Ramsey v. Coughlin, 94 F.3d 71, 73-74 (2d

Cir. 1996). Generally with regard to their motion for summary judgment, the Faculty have asserted that there are only five issues of fact material to its claims, and those are not seriously in dispute. See Mem. Supp. Summ. J. at 15. The plaintiffs have strenuously pressed that no material issue of fact is in dispute and that summary judgment is appropriate.

This court is convinced that all the evidence material to this claim is before the court (certainly that the plaintiffs would submit) and that awaiting a motion for summary judgment by DoD "would not alter the outcome." Ramsey, 94 F.3d at 74. Based on the analysis above of the statutory claim, the court concludes that DoD is entitled to summary judgment on the statutory claim as a matter of law based on the undisputed facts. Entry of summary judgment for the non-movant DoD is appropriate and expedient. See Ramsey, 94 F.3d at 74; see also Hispanics for a Fair & Equitable Reapportionment v. Griffin, 958 F.2d 24, 25 (2d Cir. 1992); Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991).

C. Solomon Amendment Is An Unconstitutional Condition

The Faculty and Professor Rubenfeld assert that the condition imposed on federal grants to Yale University by the Solomon Amendment is an unconstitutional condition. The essence of the plaintiffs' claim is that the Solomon Amendment as applied by DoD denies a benefit to Yale University on a basis that infringes their constitutionally protected rights.

For more than half a century, the Supreme Court has expressly recognized that, even though a person may not be entitled by right to a valuable benefit and "even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." Perry v. Sindermann, 408 U.S. 593, 597

(1972). While having no "right" to do so, see id., Yale University receives $300 million from the federal government.

In Perry, the Supreme Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech." Id. The basis for this conclusion is that otherwise the government could create indirectly "a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . . Such interference with constitutional rights is impermissible." Perry, 408 U.S. at 597.

DoD argues that the unconditional conditions doctrine is inapplicable because the Solomon Amendment is merely an exercise of Congress's power under the Spending Clause. See U.S. CONST. art. 1, § 8, cl. 1. The Spending Clause does permit conditions to be imposed that are reasonably related to the purpose of the federal program. See So. Dakota v. Dole, 483 U.S. 203, 213 (1987)(O'Connor, J., dissenting); see also Rust v. Sullivan, 500 U.S. 173, 196 (1991). Here, DoD makes no claim, nor could it the court believes, that the condition imposed by the Solomon Amendment is in any way related, let alone reasonably, to the purposes for which the federal funds have been given to Yale. The condition here is imposed on the recipient, not on "a particular program." Rust, 500 U.S. at 197. Under these circumstances the Spending Clause power cannot excuse a violation of the unconstitutional conditions doctrine as addressed in Perry and its progeny.

The Supreme Court has held that an important question to be determined is whether "the financial inducement offered by Congress might be so coercive as to

pass the point at which 'pressure turns into compulsion.'" Dole, 483 U.S. at 211. Put another way, is the government, by imposing conditions on the receipt of funds by Yale University, coercing the plaintiffs. Here, that issue is not in dispute because DoD has conceded the fact of coercion. See Tr. at 124. There is no question of fact that the Faculty, acting as Yale Law School, voted to suspend its NDP because of the threatened cut-off of $300 million to other parts of Yale University. This court concludes, as a matter of law, that this conceded coercion is well past the point of pressure and is compulsion.

There remains only the issue of whether the plaintiffs' constitutional rights have been violated. See Perry, 408 U.S. at 597. That issue is hotly contested by the parties. Therefore, the court must determine whether the coerced NDP suspension caused by the Solomon Amendment has resulted in an unconstitutional violation of the plaintiffs' rights.

1. First Amendment/Compelled Speech Claim

a. Introduction. The plaintiffs make two related, but distinct, arguments that DoD is compelling them to speak against their will in violation of their rights under the First Amendment. The Faculty argue that, in being compelled to suspend the NDP and include military recruiters in the CDO recruiting process, they are being prevented from sending their chosen message -- that discrimination will not be tolerated -- and forced to convey a very different message -- that discrimination will be tolerated in certain circumstances. See Mem. Supp. Summ. J. at 18-19. Professor Rubenfeld presses a slightly different argument: even if the Faculty Members are not being forced to send any message themselves, DoD is violating the plaintiffs' First Amendment rights by compelling them to ***help*** disseminate ***DoD's*** recruiting message, a message with which Professor Rubenfeld and the Faculty disagree.

DoD replies that it is not materially impeding First Amendment expression. DoD contends that YLS' message is getting through to its intended audience loud and clear, and that, at most, plaintiffs' complaint is that suspension of the NDP makes them appear hypocritical. This, DoD asserts, is not a cognizable First Amendment claim.

In addition, DoD argues that YLS is not being forced to convey implicit approval of discrimination by allowing military recruiters into the CDO. YLS allows hundreds of recruiters to participate in the CDO program and DoD contends that YLS cannot be perceived as endorsing all the views of each of these potential employers. DoD claims that observers cannot possibly understand YLS to be endorsing the military's discriminatory policies in light of the school's 27-year history of preaching non-discrimination based on sexual orientation. Additionally, DoD argues that the presence of military recruiters at CDO events only twice a year does not force the Faculty Members to "declare a belief," West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624, 631 (1943), or invade their "freedom of mind," Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Finally, DoD argues that to the extent that YLS is being compelled to do anything, it is being compelled to aid military recruiters in the *act* of recruiting, not in speech. Thus, DoD argues, the constitutionality of the Solomon Amendment should be examined in light of the Supreme Court's test for the regulation of expressive conduct formulated in United States v. O'Brien. See 391 U.S. 367, 377 (1968) (holding that a statute forbidding an individual to destroy his draft card did not violate the individual's First Amendment rights).

b. Free Speech Right. As Justice Jackson stated in Barnette, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." Wooley, 430 U.S. at 714. In other words, the First Amendment guarantees both "the right to speak freely and the right to refrain from speaking at all." Id.; see also Pac. Gas & Elec. v. Pub. Util. Comm'n of California, 475 U.S. 1, 11 (1986) (Powell, J., plurality opinion); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 71 (2d Cir. 1996). These two complementary concepts serve as "components of the broader concept of individual freedom of the mind." Wooley, 430 U.S. at 714 (quotation omitted).

Where the government compels no actual speech from an individual, but "only" compels him to aid a third party in disseminating that third party's speech, a First Amendment violation occurs. See Pacific Gas, 475 U.S. at 15 (Powell, J., plurality opinion) (stating that a California utility regulation requiring a utility company to include a third-party's newsletter in its billing envelopes constituted unconstitutional compelled speech); United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (holding that a mandatory assessment imposed on mushroom producers to support advertising promoting general mushroom sales violated the producer's First Amendment right against compelled speech). That the governmental action does not restrict an objecting party from communicating its own message does not render that action constitutional. See United Foods, 533 U.S. at 411. Nor is a violation of the freedom not to speak, or not to aid others in disseminating their speech, cured by the speaker's ability to efficiently or effectively disclaim or controvert the speech it has been forced to disseminate. See, e.g., Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974) (a newspaper cannot be forced to print replies to its editorials, despite its clear ability to print a response); see also Pacific Gas, 475 U.S. at 16-18 (Powell, J., plurality opinion) (utility company cannot

be forced to include the newsletter of a third party in its envelopes, despite ability to respond). The First Amendment grants a speaker "the autonomy to choose the content of his own message." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995).

In Wooley v. Maynard, the State of New Hampshire passed a statute requiring every non-commercial vehicle to have a license plate bearing the state motto "Live Free or Die." 430 U.S. at 707. The plaintiffs in Wooley were Jehovah's Witnesses whose religious beliefs conflicted with the state's motto, and who were repeatedly charged with violating New Hampshire's statute by covering up the motto on their automobile. See id. at 707-08. The Supreme Court held that the state could not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." Id. at 713. Even though display of the motto was "a more passive act" than the forced act of saluting the flag found in Barnette, "the difference is essentially one of degree." Wooley, 430 U.S. at 715.

In Miami Herald, the State of Florida had passed a "right of reply" statute that required any newspaper that assailed the personal character or official record of a candidate for public office to print any reply the candidate might have, free of charge. See 418 U.S. at 244. The *Miami Herald* printed several editorials critical of a candidate for a seat in the Florida House of Representatives and refused to publish the candidate's replies, in violation of the statute. See id. at 243–44. The candidate argued that the statute was constitutional because it did not "prevent[ ] the *Miami Herald* from saying anything it wished." Id. at 256. The Supreme Court disagreed, holding that "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply,

the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." Id. at 258. The Court reached this conclusion despite the fact that the newspaper had already expressed its views in the original editorials, and it could do so again in future editorials in response to the candidate's replies.

Likewise, in Pacific Gas, the Supreme Court said that the state could not force a corporation to "assist in disseminating [a third party's] message" by including the third party's newsletter in empty space found in the corporation's billing envelopes. 475 U.S. at 15 (Powell, J., plurality opinion). The Public Utilities Commission of California decided that the excess space in utility companies' billing envelopes belonged to the People of California, and it ordered the companies to include the newsletter of a third party association in those envelopes in order to provide "a variety of views" on utility issues to ratepayers. See id. at 5-6 (Powell, J., plurality opinion). Pacific Gas appealed the Commission's ruling, arguing that it had a First Amendment right "not to help spread a message with which it disagrees . . . ." Id. at 7 (Powell, J., plurality opinion). The Supreme Court agreed, stating that not only was it unconstitutional for the Commission to force the utility to use its private property to disseminate a third party's message, but such compulsion could also force the utility to speak in response to the third party's message, an additional unconstitutional result. See id. at 15-16 (Powell, J., plurality opinion) ("[this] kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster"). Thus, not only did the ability of the utility company to respond easily fail to cure the constitutional violation: it actually created the potential for a further violation.

c. **Violation of Freedom of Speech.** The Solomon Amendment violates the plaintiffs' First Amendment right to freedom of speech. First, they have been coerced into assisting DoD in sending its message. DoD's message that

the Faculty Members do not wish to aid in disseminating is that it is acceptable for an organization to exclude homosexuals, or at a minimum those who admittedly engage in homosexual conduct, from employment. This message is the essence of the military's "Don't Ask, Don't Tell" policy. See 10 U.S.C. § 654(b). The right of the Faculty and Professor Rubenfeld to refrain from aiding another in the latter's speech has been violated by the Solomon Amendment requirement that the CDO include DoD's recruiting message. Pacific Gas, 475 U.S. at 15 (Powell, J., plurality opinion). Second, the Faculty's right to express their message without modification by DoD is also being violated. The Solomon Amendment has forced the Faculty to change their message from a categorical statement that "employers who discriminate based on sexual orientation are not welcome at YLS-sponsored recruiting events" to an equivocal statement that includes the disclaimer "except for the military."[22] Forced alteration of the Faculty's message violates their First Amendment right to freedom of speech. See id. at 16 (governmental coercion that causes alteration of one's message is violative of the First Amendment).

It is quite clear from the cases discussed that DoD's argument, that no violation has occurred because the Faculty are free to disclaim, and indeed have disclaimed, DoD's position, is unavailing in this case.[23] The fact that the YLS' message of its suspended NDP "gets through" DoD's "Don't Ask, Don't Tell" policy does not insulate DoD from the

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[22] That the Faculty's message is altered by the enforcement of the Solomon Amendment is tellingly revealed by the language used by Colonel Carr: "Moreover, by singling out military recruiters, [YLS] sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that [YLS] permits to participate in its CDO programs." Carr Letter at 3. Successful enforcement of the Solomon Amendment alters that message.

[23] Thus, no need for discovery arises concerning the plaintiffs' ability to respond. See, e.g., Def's Local Rule 56 at 8, ¶ 8.

violation of the plaintiffs' First Amendment rights. See Miami Herald, 418 U.S. at 257-58. Even if it could be said that allowing DoD to participate in the CDO recruiting program could never be viewed as an endorsement by YLS of DoD's policy, under the cases discussed above the First Amendment has still been violated.[24]

DoD claims that the military does not come to campus primarily to "advocate a message of discrimination against gays and lesbians" and may not even discuss its "Don't Ask, Don't Tell" policy during recruiting. Tr. at 68-69. This claim is immaterial. The Supreme Court in Pacific Gas said that, despite not knowing exactly what the third party would say once it was given the bully pulpit at the utility company's expense, the government could not compel an organization "to associate with speech with which [it] *may* disagree." 475 U.S. at 15 (Powell, J., plurality opinion) (emphasis added). Here, it is clear that DoD's message of its "Don't Ask, Don't Tell" policy stands in direct contravention of the YLS NDP. The underlying "Don't Ask, Don't Tell" policy, and the military's express rejection of the NDP, serve as sufficient "speech messages" for the purpose of the court's First Amendment analysis. "Were the government freely able to compel . . . speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." Id. at 16.

DoD seeks to avoid plaintiffs' claim of a freedom of speech violation by arguing that recruiting is not speech, but

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[24] DoD's argument that no one would understand YLS to endorse the military's policy because YLS does not endorse all the views of the 250 employers who participate in the CDO program lacks merit. YLS does endorse the view expressed by every recruiters' endorsement of YLS' NDP. See FAIR, 390 F.3d at 237 (even if the law schools' sole disagreement with military recruiters is over signing the NDP policy, this is enough for a First Amendment violation).

merely conduct designed to perform the function of filling employment vacancies, and that any speech that occurs is incidental to this conduct. See, e.g., O'Brien, 391 U.S. at 376-77. Therefore, according to DoD, recruiting should be equated with the act of burning one's draft card, id., and not to speed- such as the words "Live Free or Die" on a license place, see, e.g., Wooley, 430 U.S. at 713. The consequence of treating recruiting as conduct, and not speech, is that the court would examine the Solomon Amendment using the lower, intermediate scrutiny standard. Compare O'Brien, 391 U.S. at 377 (propounding the intermediate scrutiny test for communicative conduct), with Pacific Gas, 475 U.S. at 19 (Powell, J., plurality opinion) (examining compelled speech using strict scrutiny).

It should first be noted that the NDP is unquestionably speech and that the Solomon Amendment infringes on the Faculty's right to speak, or utter, the NDP. Further, DoD's argument ignores the vast amount of communication inherent in recruiting. See FAIR, 390 F.3d at 236-37. Recruiting involves more than an employer alerting potential employees to a vacancy, and potential employees responding to the alert, although this is a speech message in itself. At its essence, recruiting is a bilateral discussion of the objective and subjective positives and negatives of an employer and potential employee that will lead each party to make a decision concerning whether or not to voluntarily associate with the other. The Third Circuit put the employer's goal succinctly: "to convince prospective employees that [the] employer is worth working for." Id. at 237. As such, "recruiting necessarily involves communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes' – the hallmarks of First Amendment expression." Id. (quoting Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)). Clearly, DoD seeks such communication because it presses its right to participate in the CDO's FIP and SIP, in which students sign up for

personal interviews, and strenuously argues that all the other access to students, student information, and the YLS campus is inadequate. The Solomon Amendment exists, therefore, to require YLS to permit DoD speech in recruiting.

d. Strict Scrutiny. Having found that YLS, acting through the Faculty, has been unconstitutionally coerced into foregoing its own message and into assisting DoD in the dissemination of DoD's message of its "Don't Ask, Don't Tell" policy, the court's analysis does not end there. Because not all burdens on constitutional rights are constitutional violations, the court must next address whether the government's action can withstand scrutiny.

DoD argues that the Solomon Amendment should be examined under the intermediate scrutiny test promulgated by O'Brien for communicative conduct. While the issue of where precisely one draws the line between conduct and speech for these purposes is not always an easy one, it does not present particular difficulty in this case. The NDP is clearly a speech message.[25] And as already discussed, the recruiting coerced by the Solomon Amendment involves speech and communication of a viewpoint. Thus, the court rejects DoD's argument that the intermediate scrutiny test applies. See id. at 236-37 (oral and written communication used for recruiting purposes is speech); see also Wooley, 430 U.S. at 715 (New Hampshire motto "Live Free or Die" on license plate sufficient "ideological message" to invoke First Amendment protection); Boy Scouts of America v. Dale, 530 U.S. 640, 651-52 (2000) (promulgated regulations such as Scout Law, the Boy Scout Oath, and organization position

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[25] The court imagines one might argue that promulgating a policy like the NDP is an action or conduct, but if that is so, it is no less protected expression than the act of publishing a newspaper. See Miami Herald, 418 U.S. at 256 (state cannot compel editors to publish specific matter).

statements sufficient evidence of protected First Amendment expression).

A governmental regulation that burdens a private individual or organization's First Amendment rights by compelling that individual or organization to speak or assist in disseminating another's speech is subject to strict scrutiny. See Pacific Gas, 475 U.S. at 19 (Powell, J., plurality opinion) (regulation could be found valid "if it were a narrowly tailored means of serving a compelling state interest."); see also FAIR, 390 F.3d at 242 (citing Riley v. Nat'l Ass'n of the Blind of North Carolina, Inc., 487 U.S. 781, 798 (1988) (regulation impairing speakers' First Amendment rights under the compelled speech doctrine could not survive "exacting First Amendment scrutiny")). While strict scrutiny is an exacting standard, the Supreme Court has clearly rejected the proposition that "strict scrutiny is 'strict in theory, but fatal in fact.'" Landell v. Sorrell, 382 F.3d 91, 112 (2d Cir. 2004) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)). Under the strict scrutiny test, DoD bears two burdens: 1) proving the existence of a compelling state interest and 2) showing that the restriction is narrowly tailored to advance that interest. Id. at 110.

The first of the Government's burdens, a compelling interest, is not at issue here. The plaintiffs do not contest that Congress's interest in raising and maintaining an effective military is a compelling government interest.[26] Tr. at 11. However, the presence of a broad compelling interest does not necessarily mean that the Congress has chosen a narrowly tailored avenue to address that interest. Because the court finds that the Solomon Amendment is not narrowly

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[26] The Faculty did suggest at oral argument that, while the government has a compelling interest to raise and maintain a military, it does not have a compelling interest in doing so by forcing its way into the CDO recruiting process. See Tr. at 11-12. The court views this as a narrow tailoring argument that it will address, *infra*.

tailored, it need not decide whether Congress's interest in raising an effective military is compelling in this setting. The court will assume this interest is compelling, as it believes it is. The court will, therefore, proceed to address DoD's other burden under the Landell test, whether the speech restriction is narrowly tailored.

In Landell, the Second Circuit wrote "to explain the nature of the narrow tailoring inquiry required" in the First Amendment setting. 382 F.3d at 125. It explained that "[t]he narrow tailoring inquiry examines the 'fit' between means and ends." Id. In addition to showing that the Solomon Amendment significantly advances Congress's interest in raising and maintaining a military, "[i]n order to satisfy the 'narrow tailoring' standard, the [DoD] must also prove that the mechanism chosen is the *least restrictive means* of advancing that interest." Id. at 126 (emphasis in original) (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000)). This is to say, "'[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'" Id. at 126 (quoting Playboy Entm't Group, 529 U.S. at 813). Therefore, the court must address the extent to which Congress's interest is advanced by the Solomon Amendment and whether the government has created an issue of fact with regards to its burden of proving the absence of less restrictive alternatives, which alternatives would be as effective in advancing its compelling interests while impinging less on First Amendment rights. See id.

In Landell, the State of Vermont defended, *inter alia*, mandatory campaign spending limits enacted in an attempt to reform its campaign finance laws and battle political corruption. See id. at 96. Vermont had argued that it "'had already explored less restrictive alternatives and found them to be ineffective.'" Id. at 132. It cited its previous failed attempt to impose voluntary spending limits through legislation. Id.

The Second Circuit found this to be insufficient evidence of narrow tailoring. In remanding the case to the district court for reconsideration of the narrow tailoring issue, the Second Circuit requested findings of fact relating to several questions: "(1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the [government's] interests." Id. at 136 (emphasis in original).

Here, DoD has offered no proof that the Solomon Amendment is the least restrictive means by which the Congress can successfully raise and maintain an effective military. DoD claims that it has confronted "disaffection" on college campuses that "impairs the ability of the military to recruit," a problem that is "compounded" by periodic military spending cuts. Mem. Opp. Summ. J. at 3. While it claims that "Congress has taken a *variety* of steps over the years to remedy the problem," it lists only several iterations of the same step. Id. at 3 (emphasis added). DoD lists attempts by Congress, beginning in 1968 and continuing through the present day, to penalize institutions of higher learning who it believes are "barring" military recruiters from their campuses by denying them various forms of federal funding. See id. at 3-4. The Solomon Amendment is merely the most recent, and most reaching, of these attempts. See id. at 4-5.

The absence of any evidence of Congressional attempts at alternative types of regulation, information concerning which has been available to DoD since the beginning of this litigation, weighs heavily against its narrow tailoring claim. As the Third Circuit noted,

> Unlike the typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

FAIR, 390 F.3d at 234-35. Therefore, the Third Circuit found that the Solomon Amendment was not narrowly tailored, and thus unconstitutional under strict scrutiny analysis. See id. at 242. In this case, DoD has failed to produce any evidence to support a finding that the Solomon Amendment is narrowly tailored to substantially advance a compelling governmental interest.

In addition, DoD offers no evidence to support a finding that the Solomon Amendment, and the suspension of the NDP for the past two years at YLS that it caused, has advanced its goal of raising an army through effective recruiting. DoD merely asserts that the CDO program "provides an easy and efficient means of assisting students in finding jobs," a means the military must have access to in order to compete successfully for students.[27] Mem. Opp. Summ. J. at 29-30. Despite the fact that any information on military recruiting successes and failures is uniquely within the control of the military, DoD has offered no evidence that either 1) the number of recruits it obtained prior to the

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[27] It bears noting that approximately 50% of Yale law school students obtain employment as judicial law clerks, a recruiting process that does not use the CDO program or any form of on-campus recruiting. See Bryant Decl. at ¶ 5. This would appear to undercut DoD's assertion that access to the CDO program is necessary to law student recruiting.

suspension of the NDP was insufficient, or 2) that implementation of the Solomon Amendment, in the form of the suspension of the NDP, has increased, or is even likely to increase, the number of those recruits. In fact, the only reference made to any success or failure of recruiting in this litigation is the military's admission that, in the more than two years the NDP has been suspended, it has obtained only one recruit and that this recruit did not come to the military via the CDO program. See Def's Local Rule 56 at ¶ 49. While it is mathematically possible for military recruiting at Yale to have been worse prior to suspension of the NDP, DoD has offered no evidence that such was the case. This is plainly insufficient to carry the government's burden of creating at least a material issue of fact concerning how enforcement of the Solomon Amendment is narrowly tailored to advance the interests of Congress in raising an army.[28]

Therefore, the Solomon Amendment cannot withstand strict scrutiny and is unconstitutional as applied to YLS. The motion for summary judgment of the Faculty and Professor Rubenfeld on the First Amendment compelled speech claim is granted.

2. Faculty's First Amendment/Association Claim

The Faculty also assert that their First Amendment right to freedom of association is infringed by the Solomon Amendment. For more than four decades, the Supreme Court has recognized that individuals have a First Amendment freedom to associate in order to advance shared

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[28] DOD has not come forward, as required under Local Rule 56(a), with evidence to create even an issue of fact that Congress considered alternative legislation, that the Solomon Amendment in fact materially advanced Congress's goals, or that other, less restrictive, alternatives would not be as effective as the Solomon Amendment. These facts are all within DoD's control.

beliefs. See Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 418-19 (2d Cir. 2004) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)). Among the most highly protected forms of association is that undertaken to express opinions on public issues. See NAACP v. Claiborne, 458 U.S. 886, 913 (1982). Such First Amendment expression "'is more than self-expression; it is the essence of self-government.'" Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)). Supreme Court case law reflects "a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

The Faculty assert that its NDP is an expression of their views on employment discrimination based on, *inter alia,* sexual orientation. Both discrimination and sexual orientation are public issues today. By requiring potential employers to subscribe to the NDP prior to becoming part of the YLS recruiting program, the Faculty argue that they are using their freedom to associate, or disassociate, both to inculcate their values in their students and to propagate publicly their beliefs regarding discrimination. The Faculty claim that the Solomon Amendment impermissibly interferes with their First Amendment right to disassociate from an entity, the United States military, whose explicit policies conflict with YLS' institutional beliefs, as expressed in the NDP. The Faculty claim that they "intended to convey [their] disapproval of the military's discrimination against gays and lesbians by denying military recruiters the services of the CDO." Mem. Supp. Summ. J. at 22. The Faculty argue that this refusal constitutes a decision not to permit the military to officially associate itself with YLS recruiting programs. According to YLS:

> it is not the mere presence of military recruiters at the Law School that distorts the Faculty Members' message and damages the protective educational

> environment they have sought to create. It is the military's commandeering of Law School resources in carrying out its discriminatory recruitment practices under the Law School's auspices that the Nondiscrimination Policy forbids.

Mem. Supp. Summ. J. at 23-24. The Faculty rely on cases such as Claiborne, Hurley, and Dale for the proposition that the First Amendment guarantees a private institution's right not to associate itself with an entity whose explicit policies conflict with the private party's institutional values.

DoD argues that should the court analyze the case at bar on associational grounds, Hurley and Dale do not provide support for the Faculty's position. DoD distinguishes Hurley by noting that it involved marching in a parade, "a quintessential form of expressive activity," and that the participation of the gay and lesbian group that attempted to march would result in that group's message being attributed to the parade organizers. Mem. Opp. Summ. J. at 17. DoD claims that YLS' long tradition of opposing discrimination, the sophistication of the average law school student, and statements made by several YLS students evidencing their understanding that YLS is being forced to choose between the NDP and federal funding, provide evidence that the chance of such misattribution "is vanishingly small." Mem. Opp. Summ. J. at 18. The unlikelihood of misattribution and YLS' ability to publicize their disagreement, DoD argues, bars any associational claim.

In this regard, DoD also seeks to distinguish Dale on several grounds. First, it argues that the Solomon Amendment does not force YLS to accept military recruiters as members of their organization, but merely as temporary visitors to their campus. Second, the military recruiters would not be speaking "for" YLS, as an assistant scout master would for the Boy Scouts. Third, DoD argues that while one of the Boy Scouts' main goals was to instill values

in young people, a goal threatened by the presence of a leader who espoused values the Scouts opposed, recruiting is essentially an economic activity, and military recruiters do not seek to instill any values in the students they interview. Thus, military recruiting does not "[strike] at the heart of [YLS'] goals," Mem. Opp. Summ. J. at 20, and the Faculty's associational rights are not violated. The court disagrees and finds that there is substantial support for the Faculty Members' association claim.

In Dale, the Boy Scouts appealed a New Jersey Supreme Court decision that held that the state's public accommodations law denied the Boy Scouts the ability to revoke an assistant scout master's membership in the organization upon learning that he was gay. 530 U.S. at 644. The Boy Scouts argued that "homosexual conduct is inconsistent with the values it seeks to instill," and that by forcing it to include an open and avowed homosexual, the New Jersey public accommodations law violated its First Amendment right of expressive association. Id.

In order to determine the Boy Scouts' claim, the Supreme Court formulated a three-part test. As concisely summarized by the Third Circuit recently, these elements are: "(1) whether the group is an "expressive association;" (2) whether the [governmental] action at issue significantly affects the group's ability to advocate its viewpoint; and (3) whether the [government's] interest justifies the burden it imposes on the group's expressive association." FAIR, 390 F.3d at 231; see also Dale, 530 U.S. at 648-58.

a. Expressive Association. In concluding that the New Jersey law violated the Boy Scouts' First Amendment rights, the Dale Court noted that "the First Amendment's protection of expressive association is not reserved for advocacy groups." 530 U.S. at 648. "Associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First

Amendment. An association must merely engage in expressive activity that *could* be impaired in order to be entitled to protection." Id. at 655 (emphasis added). However, "to come within [the First Amendment's] ambit, a group must engage in some form of expression, whether it be public or private." Id. at 648. The Court found that, through its written mission statement, the Scouts directly expressed the values it supports and attempts to instill in its members. Id. at 649. The Court further held that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Id. at 650. Thus, the Court found the Boy Scouts to be an expressive association.

In examining the Boy Scouts' ability to advocate its viewpoint, the Court first noted that the Scout Oath and Law, on which the Scouts based their claim, does not explicitly mention sexual orientation. See id. However, the Scouts interpreted the terms "morally straight" and "clean" as being at odds with homosexuality and homosexual conduct. See id. The Scouts asserted that "it 'teach[es] that homosexual conduct is not morally straight' . . . and that it does 'not want to promote homosexual conduct as a legitimate form of behavior." Id. at 651. The Dale Court accepted that assertion, stating that it "need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality" and rejected the notion that it is the "role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." Id.

Thus, YLS does not need to be an advocacy group to claim a right to freedom of association, but it must engage in some expression, publicly or privately, in order to be protected by the First Amendment. See id. at 648. Like the Boy Scouts, YLS has asserted the values that it seeks to espouse outwardly and to inculcate within the law school. See Mem. Supp. Summ. J. at 22. Furthermore, YLS has

promulgated a written policy statement outlining those values. See id. This written policy is the NDP, which clearly states that YLS is opposed to employment discrimination on the basis of, *inter alia,* sexual orientation. See Slifkin Decl. at Ex. E. YLS has gone further than the Boy Scouts and explicitly adopted a policy that announces how it expresses the NDP both to its students and to the outside world: by banning prospective employers from using CDO services if they do not subscribe to the NDP. YLS is clearly an expressive association for the purposes of First Amendment analysis.

b. Affect Ability to Advocate. Turning to the extent to which New Jersey's law interfered with the Scouts' expression, the Dale Court explicitly gave great deference to "an association's view of what would impair its expression." 530 U.S. at 653. While the Court noted that an organization could not immunize itself from anti-discrimination laws simply by asserting inclusion of a disfavored individual would impair its message, it gave great weight to the fact that Dale was openly gay and a leader in the gay community in concluding that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Id. In fact, Dale's openly gay status and the Boy Scouts' assertions that his presence would impair their message appear to be the only two things the Court considered in finding substantial interference. See id. at 651-56.

DoD's argument -- that Dale is distinguishable because military recruiters do not become a part of the faculty and do not officially speak for YLS while they are on campus -- does not bear up. First, Hurley makes clear that mere participation in an event sponsored by an expressive association is sufficient to invoke that association's First Amendment protections. See, e.g., 515 U.S. at 572-73

(noting that "every participating unit affects the message conveyed by [a] private organizer"). Secondly, the Dale Court held that the Boy Scouts could expel Dale, not merely remove him from his leadership position in the Scouts. See, e.g., Dale, 530 U.S. at 645. It was Dale's "presence," id. at 653, not his position as an official spokesman for the Scouts, that "would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," id.

The key to Dale's analysis of the second factor is the substantial deference given to a private organization's determination of 1) what its message is and 2) what significantly interferes with its ability to advocate its chosen message. As the Supreme Court pointed out, once an organization asserts a message or value that it seeks to express, federal courts "need not inquire further to determine the nature of the [organization's] expression." Id. at 651. Likewise, great deference is due to "an association's view of what would impair its expression." Id. at 653. As the Third Circuit has pointed out, in Dale "the reason why there was 'no question' . . . that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*."[29] FAIR, 390 F.3d at 233 (citing Dale, 530 U.S. at 653) (emphasis in original).

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[29] While not a factor in its decision, the court notes that the deference the Dale Court accorded expressive associations would appear to be particularly appropriate in the university setting, in light of the Supreme Court's "tradition of giving a degree of deference . . ." to universities because they "occupy a special niche in our constitutional tradition." Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003); see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.).

YLS makes two things clear. First, it clearly asserts that, through its NDP and its policy that employers cannot utilize the CDO without subscribing to the NDP, it seeks to express the idea that employment discrimination based on sexual orientation, even if done by the military, is wrong. See Mem. Supp. Summ. J. at 22. YLS also makes clear that it believes giving military recruiters access to the CDO, and therefore to officially-sanctioned-YLS-recruiting programs, substantially affects its ability to advocate its chosen message opposing employment discrimination, both to its students and to the public. See Mem. Supp. Summ. J. at 23-24.

The Supreme Court's analysis in Dale lends significant support to this argument. The majority in Dale made much of Dale's status as an openly homosexual male and a leader in the gay community. 530 U.S. at 653. His inclusion in the Scouts forced them to "send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Id. And as the Court in Hurley noted, requiring the parade organizers to include an unwanted group "requir[ed] petitioners to alter the expressive nature of their parade." 515 U.S. at 572-73.

Here, the military is completely open about its policy of excluding individuals who engage in homosexual conduct from service in the armed forces. The statutory underpinnings of the "Don't Ask, Don't Tell" policy can be found in the United States Code. See 10 U.S.C. 654(b). Nothing could constitute a more open espousal of a given viewpoint than codification in the laws of our nation. Thus, as the inclusion of an open homosexual in an organization opposed to homosexuality obviously impaired the Boy Scouts' message in Dale, the inclusion of the military in YLS' recruiting program impairs its message: it forces it to "send a message . . . that [YLS] accepts [employment discrimination based on sexual orientation] as a legitimate form of behavior." See, e.g., Dale, 530 U.S. at 653. When viewed in conjunction with the high level of deference

afforded to organizations by the Supreme Court in Dale as to what an organization claims is its message and as to its claim that the Government's action will undermine YLS' message, it becomes obvious that the Solomon Amendment substantially interferes with the Faculty Members' ability to advocate their viewpoint. It "requires" YLS "to alter the expressive content" of its policy. Hurley, 515 U.S. at 572-73.

c. Strict Scrutiny. Finally, the Dale Court undertook the balancing inquiry demanded by the third prong of its test by applying strict scrutiny. In explicitly rejecting the use of O'Brien intermediate scrutiny, the Court found that laws "directly and immediately affect[ing] associational rights" must be reviewed using "traditional First Amendment analysis . . . ." Dale, 530 U.S. at 659. The Dale Court focused on the compelling interest prong of strict scrutiny. See id. Concluding that New Jersey's interest in preventing discrimination was not compelling enough to justify the burden on the Boy Scouts' associational rights, the Court held that New Jersey's attempt to apply its public accommodation law to the Scouts ran afoul of the First Amendment. Id.

As in Dale, strict scrutiny applies in the case at bar, and DoD must prove that it has a compelling interest that "justif[ies] such a severe intrusion on [an organization's] rights to freedom of expressive association." Id. "But '[i]t is not enough to show that the [DoD's] ends are compelling; the means must be carefully tailored to achieve those ends.' FAIR, 390 F.3d at 234 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). See also Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990) (applying strict scrutiny to patronage system requiring membership in or support of the Republican Party). In the instant case, the court again assumes that the government's interest in raising and maintaining a military is a compelling

one. Therefore, the court must consider the second prong of strict scrutiny analysis: narrow tailoring.

The Solomon Amendment is not narrowly tailored to serve the government's compelling interest. As the court laid out more fully above, DoD fails to offer any proof, despite any such proof being within its control, that it could carry its burden of narrow tailoring. See Section IV.C.1.d, *supra*. It offers neither proof that the Solomon Amendment substantially advances the government's interests, nor proof that it is the least restrictive means. See Landell, 382 F.3d at 126.

Therefore, the Solomon Amendment is not narrowly tailored to advance a compelling government interest, and thus unjustifiably burdens the Faculty Members' First Amendment right of expressive association. The court concludes that there are no material issues of fact, and the Faculty's motion for summary judgment on their First Amendment freedom of association ground is granted as a matter of law.

3. Faculty's Fifth Amendment/Educational Autonomy Claim

As a second basis for their unconstitutional conditions claim, the Faculty Members assert that the Solomon Amendment violates their right to educational autonomy. Framing it as a substantive due process right under the Fifth Amendment, the Faculty describe it as the right "to ban discriminatory conduct from all of the Law School's activities in order to protect their students and to create the environment necessary to carry out the Faculty Members' educational mission." Mem. Supp. Summ. J. at 29. The Faculty cite a handful of cases that they argue recognize "a faculty's autonomous governance of the [university's] educational environment," id. at 30, as a right "'implicit in the concept of ordered liberty.'" Id. at 29 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other*

grounds by Benton v. Maryland, 395 U.S. 784 (1969)). This argument reaches too far.

The substantive due process rights recognized in Palko are those that "have been found to be implicit in the concept of ordered liberty . . . ." 302 U.S. at 325; see also Local 342, Long Island Pub. Serv. Employees v. Town Bd. of the Town of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994). They are "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled in part on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964)). The Supreme Court has warned, however, that federal courts should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985)); see also Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 144 (2d Cir. 1994). The Collins Court explained that "[t]he doctrine of judicial self-restraint requires [federal courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." 530 U.S. at 125; see also Local 342, 31 F.3d at 1196.

The cases cited by the Faculty provide for a substantive due process right both to educate and to an education. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400 (1923). A school's right to educate clearly includes the right to make determinations concerning the school's curriculum and qualifications necessary for membership in the student body. See id. (holding that teacher had the fundamental right to teach the German language to his students); see also Grutter, 539 U.S. at 328-29 (granting as a result of the university's "special niche in our constitutional tradition," a degree of deference to "a university's academic decisions" including its determination that student body diversity

constitutes a compelling interest for the purposes of student admissions); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (holding that a school does not violate a student's First Amendment rights when it makes editorial decisions for a publication printed pursuant to a class within its curriculum); Ewing, 474 U.S. at 225 (showing "great respect" for a university's determination of "a genuinely academic decision," such as when a student should be dropped from an academic course of study). The Supreme Court has also extended deference to an educational institution's decision to promote extracurricular student speech through content neutral funding of student organizations. See Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 232-33 (2000).

However, the scope of this "right to educate" is not as broad as the Faculty suggest. The American "concept of ordered liberty" is not implicated when the federal government passes a law governing who may participate in college recruiting programs. Such a law does not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Palko, 302 U.S. at 325. The court is aware of no case law that compels the conclusion the Faculty urge.

The Faculty have urged the court to view the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), as, *inter alia,* calling into question the constitutionality of the "Don't Ask, Don't Tell" policy. This court reads Lawrence as limited to the most private of personal, sexual relationships between consenting adults. See 539 U.S. at 573-74. According to the Lawrence Court:

> . . . our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . "These matters, involving the most intimate and personal choices a

> person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Id. (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)). No "most intimate and personal choice" is implicated in recruiting in an educational environment.

Therefore, the court finds that this is precisely the type of situation in which it should exercise the judicial restraint appropriate in the substantive due process area. Furthermore, because the plaintiffs' substantive due process educational autonomy claim is functionally a First Amendment academic freedom claim, see Keyishian v. Bd. of Regents of the Univ. of the State of New York, 385 U.S. 589, 603 (1967) "[Academic] freedom is . . . a special concern of the First Amendment . . . ."), the court need not create, and must forgo creating, a new substantive due process right, see City of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) ("'[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims-) (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994)).

For the foregoing reasons, the court grants the DoD's motion to dismiss the Faculty's Fifth Amendment claim and denies as moot the Faculty's motion for summary judgment on that claim.

V. CONCLUSION

For the reasons stated above, the plaintiffs' motion for summary judgment [Dkt. No. 34] is granted in part and

denied in part, and the still-pending defendant's motion to dismiss [Dkt. No. 12] is granted in part and denied in part. The defendant's motion to dismiss the plaintiffs' First Amendment compelled speech and association claims is **DENIED** as moot, and the plaintiffs' motion for summary judgment on those claims is **GRANTED.** The defendant's motion to dismiss the plaintiffs' Fifth Amendment claim is **GRANTED,** and the plaintiffs' motion for summary judgment on that claim is **DENIED.** The plaintiffs' motion for summary judgment on their statutory compliance claim is **DENIED,** and the court *sua sponte* **GRANTS** summary judgment to the defendant on that claim. Defendant's request pursuant to Rule 56(f) is **DENIED.**

Accordingly, the Solomon Amendment is hereby declared unconstitutional as applied, and the defendant is enjoined from enforcing it against Yale University based upon Yale Law School's Non-Discrimination Policy. The Clerk is ordered to close the case.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 31st day of January, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

APPENDIX B

JUDGMENT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. BURT, OWEN M. FISS, HAROLD HONGJU KOH, KENJI YOSHINO, BRUCE ACKERMAN, ANNE L. ALSTOTT, IAN AYRES, JACK M. BALKIN, YOCHAI BENKLER, RICHARD R.W. BROOKS, AMY L. CHUA, MORRIS L. COHEN, DENNIS E. CURTIS, HARLON L. DALTON, DREW S. DAYS III, BRETT DIGNAM, STEVEN B. DUKE, WILLIAM N. ESKRIDGE, JR., DANIEL C. ESTY, DANIEL J. FREED, ROBERT W. GORDON, MICHAEL J. GRAETZ, OONA A. HATHAWAY, DAN M. KAHAN, PAUL W. KAHN, JAY KATZ, S. BLAIR KAUFFMAN, ALVIN K. KLEVORICK, ANTHONY T. KRONMAN, CARROLL L. LUCHT, DANIEL MARKOVITS, JERRY L. MASHAW, JEAN KOH PETERS, ROBERT C. POST, J.L. POTTENGER, JR., JUDITH RESNIK, CAROL M. ROSE, SUSAN ROSE-ACKERMAN, JED RUBENFELD, VICKI SCHULTZ, REVA SIEGEL, JOHN G. SIMON, ROBERT A. SOLOMON, STANTON WHEELER, STEPHEN WIZNER, members of the faculty of the Yale Law School

V 3:03cv1777JCH

DONALD H. RUMSFELD, in his official capacity as United States Secretary of Defense

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of the plaintiffs' motion for summary judgment and the defendant's motion to dismiss.

The Court held oral argument and reviewed all of the papers filed in conjunction with the motions. On January 31, 2005, a Ruling on Plaintiffs' Motion for Summary Judgment and Defendant's Motion to Dismiss was filed, granting the

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

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This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of the plaintiffs' motion for summary judgment and the defendant's motion to dismiss.

The Court held oral argument and reviewed all of the papers filed in conjunction with the motions. On January 31, 2005, a Ruling on Plaintiffs' Motion for Summary Judgment and Defendant's Motion to Dismiss was filed, granting the

motions in part and denying the motions in part and ruling that the Solomon Amendment is declared unconstitutional as applied, and enjoining the defendants from enforcing it against Yale University based on Yale Law School's Non-Discrimination Policy.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the plaintiff and the case is closed.

Dated at Bridgeport, Connecticut, this 3rd day of February, 2005.

KEVIN F. ROWE, Clerk

By /s/Catherine Boroskey
Deputy Clerk

Entered on Docket _____

APPENDIX C

RULING ON DEFENDANT'S RULE 12(B)(1) MOTION TO DISMISS

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT A. BURT, ET AL, Plaintiffs,	:	CIVIL ACTION NO. 3-03-cv-1777 (JCH)
v.	:	
DONALD H. RUMSFELD, in his official capacity as U.S. Secretary Of Defense, Defendant.	:	JUNE 9, 2004

RULING ON DEFENDANT'S RULE 12(B)(1) MOTION TO DISMISS

Defendant Donald Rumsfeld, sued in his official capacity as Secretary of Defense, moves under Federal Rule of Civil Procedure 12(b)(1) to dismiss the complaint against him for lack of standing and lack of ripeness. For the following reasons, the motion is denied.

I. BACKGROUND

Since 1978, Yale Law School ("YLS") has prohibited discrimination on the basis of sexual orientation. Yale's Nondiscrimination Policy ("NDP"), which applies to all aspects of YLS life, provides :

> Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients. All employers using the school's placement services are required to abide by this policy.

Employers who refuse to certify their compliance with the NDP are barred from school-sponsored recruiting services. Compl. at ¶ 2, 17.

In light of the military's regulations regarding gay and lesbian service members, popularly known as the "Don't Ask Don't Tell" policy, the Department of Defense has refused to certify its compliance with the Law School's NDP and has thus been denied the use of YLS's Career Development Office ("CDO") since 1978. Compl. at ¶ 28. Instead, the law school has offered military recruiters open access to classrooms and other meeting spaces on campus for informational sessions and other recruiting activities, including interviews, at the invitation of a student organization; open access to any student or student group to reserve a classroom or other meeting space for such a meeting at any time; and open access to student contact information.

In 1995, in light of policies like the YLS NDP, and related controversies over the presence of ROTC programs on university campuses, Congress enacted the Solomon Amendment, now codified at 10 U.S.C. § 983. Among other things, the Solomon Amendment denies certain categories of federal funding to institutions of higher education that prevent military recruitment on campus. The Amendment in its current form provides:

> **(b) Denial of funds for preventing military recruiting on campus.**--No funds described in subsection (d) (2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

The Department of Defense's original interpretive regulations limited loss of funding to the particular part of the university ("subelement") found not to be in compliance. In other words, if a subelement of a university, like a law school, denied access to military recruiters, then only that subelement would lose funding, not the entire institution. See 61 Fed. Reg. 7739, 7740 (Feb. 29, 1996). Further, the Amendment initially implicated only Department of Defense ("DoD") funding. Because law schools, unlike other segments of a university, are not recipients of large amounts of DoD funds, the Amendment in its initial form apparently provided little leverage to encourage law schools to change their recruiting policies.

In 1997, Congress extended the rule denying federal funds to apply to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation, as well as Defense. Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified at 10 U.S.C. § 983. This extension threatened certain types of student aid, including Perkins Loans and work study funds. However, the applicable regulations continued to cabin the consequences of a subelement's failure to grant access to

military recruiters to that subelement itself, such that non-compliance did not affect the larger university.

In the fall of 1999, Congress enacted further changes to the Amendment, this time to protect students of non-compliant university subelements by exempting funds "available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999). Congress also modified the statute's language to specifically apply to any "institution of higher education (including any subelement of such institution)." 10 U.S.C. § 983(c) (2), as modified by Pub. L. No. 106-65, § 549(a)(1) (1999).

After this change, the DoD adopted interim regulations, effective immediately, that defined an "institution of higher education" to include "all sub-elements of such an institution." Defense Federal Acquisition Regulation Supplement: Institutions of Higher Education, 65 Fed. Reg. 2056 (Jan. 13, 2000). The effect of this redefinition imputed a subelement's violation to the entire university, such that a violation in any part of the university would put the funding of the whole university in jeopardy. 48 C.F.R. § 252.209-7005.

The DoD also extended the plain text of the Amendment in another way. Though the Amendment itself speaks only to schools that "in effect, prevent" military recruiting on campus, the DoD promulgated regulations requiring access "at least equal in quality and scope" to that afforded to other employers, if not identical. 32 C.F.R. § 216.4(c)(3). The plaintiffs allege that the DoD interprets this requirement to mandate that military recruiters receive the same or better access to university recruiting and its students. Compl. at ¶ 4.

Plaintiffs claim that since 2001, the Department of Defense has demanded not only that the military receive

access to the YLS campus, "but also that the Faculty Members provide the military with the public association and endorsement necessarily conveyed by allowing the military undifferentiated access to the [Career Development Office formal recruiting] program." Compl. at ¶ 12. This insistence conflicts with YLS's NDP, which requires all recruiting employers to sign a non-discrimination statement.

The current conflict between YLS and the DoD began with a several-year-long series of administrative exchanges between YLS staff and various military recruiting officers regarding the NDP. On December 17, 2001, Colonel Clyde J. Tate, III, U.S. Army, advised Yale University President Richard Levin, "I understand that military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information at Yale University by a policy or practice of the Yale Law School." Colonel Tate advised Levin that "current statutes deny the use of certain federal funds" to institutions of higher education with a policy or practice of denying military recruiting personnel entry to campuses, and stated, "[t]his letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of Yale University as well as Yale Law School." See Letter of Col. Clyde Tate to Richard Levin, 12/18/01, Def.'s Mem. In Supp. Of Mot. To Dismiss ("Def.'s Mem."), Ex. B. Colonel Tate advised that, "based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract." Id.

A series of letters and meetings ensued, with military officials repeatedly categorizing YLS's NDP as not in compliance with the Solomon Amendment. On May 29, 2002, Colonel Tate informed President Levin, "Unless we receive new 'information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will

consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial." Letter of Clyde Tate to Richard Levin, 5/29/02, Def.'s Mem., Ex. B. To temporarily avoid this funding loss (of over $300 million annually), the YLS faculty voted in 2002 to approve a "temporary" suspension of the NDP. Compl. at ¶ 28; Letter of Richard Levin to Colonel Mickey Miller, 9/26/02, Def.'s Mem., Ex. B.

Conflict between YLS and the military continued. In early 2003, the Army referred the controversy to the Department of Defense. A DoD representative assured President Levin that, "prior to any determination of ineligibility, the Department will be sending [Yale] a letter setting out its position on compliance with the Solomon Amendment, including exactly what Yale must do to be compliant." Letter from Richard Levin to Dr. David S.C. Chu, Undersecretary of Defense for Personnel and Readiness, 3/10/03, Def.'s Mem., Ex. B.

On May 29, 2003, the Office of the Under Secretary of Defense issued a letter by William J. Carr, Acting Deputy Undersecretary for Military Personnel Policy ("Carr letter"), opining that YLS and, by implication, Yale University, are in violation of the Solomon Amendment. The Carr letter set forth the applicable law and regulations and the DoD's interpretation, and explained that YLS was not complying with DoD regulations and was "in effect" preventing military recruiting on campus. Compl. at ¶ 13. Carr based this finding of noncompliance partially on his belief that the YLS policy "sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with other organizations that Yale permits to participate in CDO programs." See id. Carr further informed Yale that the NDP, despite its temporary suspension, "remains an obstacle to military recruiters and their ability to plan for, schedule, and gain access to Yale Law School students for the purpose of military recruiting." As such,

Carr concluded, "Yale's policy is in violation of federal law," and advised Levin, "it is my duty under law to recommend to the Principal Deputy Under Secretary of Defense for Personnel and Readiness that Yale University be determined ineligible for Department of Defense funding." Carr gave notice that he would so notify on June 29, 2003, "unless you advice me before that date of a change in policy sufficient to overcome the deficiencies outlined above."

On October 16, 2003, forty-four YLS faculty members filed this suit. The faculty members allege that the Solomon Amendment and 32 C.F.R. 216.4(c)(3), which mandates that access to campus by military recruiters must be "equal in quality and scope," on their face, and as applied by the DoD to preclude YLS's NDP, violate the plaintiffs' First and Fifth Amendment rights. The plaintiffs also allege that the equal access requirement of 32 C.F.R. § 216.4(c)(3) is not a reasonable interpretation of the Amendment, and that in any case YLS is in compliance.

II. DISCUSSION

The Secretary of Defense moves to dismiss the complaint against him under Rule 12(b)(1) for lack of standing and lack of ripeness. A court must dismiss a case for lack of subject matter jurisdiction under Rule 12(b) (1) when it lacks the statutory or constitutional power to adjudicate it. See, e.g., Luckett v. Bure, 290 F.3d 493, 496-97 (2d Cir. 2002). "[T]he plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Id. (internal quotations omitted). Ripeness and standing are both properly considered on a Rule 12(b)(1) motion. See Lerner, 318 F.3d at 128 (discussing 12(b)(6) and 12(b)(1)); Auerbach v. Board of Educ., 136 F.3d 104, 108-09 (2d Cir. 1998); Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994). "In resolving the question of jurisdiction, the district court can

refer to evidence outside the pleadings." Luckett, 290 F.3d at 496-97.

A. Standing

The defendant first argues that the faculty members do not have standing to bring this suit, because the rights in jeopardy are in fact Yale's rights, not those of the YLS faculty. The plaintiffs insist that their own rights – rights to freedom of speech and association, and to due process of – law are at stake.

In essence, the standing inquiry focuses on whether the plaintiff is the proper party to bring suit. See Baur, 352 F.3d at 632; see also Becker v. Fed. Election Comm'n, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that standing is assessed at the time of filing). This inquiry is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 820 (1997). In order to have constitutional standing to pursue a claim, a plaintiff must demonstrate: (1) an injury in fact; (2) caused by the conduct complained of; (3) and that such injury is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also Lerman, 232 F.3d at 142. The defendant has not contested redressability.

When standing is raised at the pleading stage, it is "subject to the same degree of proof that governs other contested factual issues." Baur v. Veneman, 352 F.3d 625, 632 (2d Cir. 2003); see also Lujan, 504 U.S. at 566 (allegation of injury may be sufficient to survive a motion to dismiss, even if, on a motion for summary judgment, the facts do not exist to support the allegation); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 45 n.25 (1976) (same); cf. In Re Bennett Funding Group, 336 F.3d 94, 102 (2d Cir. 2003) (denial of motion to dismiss based on standing

does not preclude raising the issue again at the summary judgment stage). This means that all facts averred by the plaintiffs must be taken as true for purposes of the standing inquiry. Lerman, 232 F.3d at 142. This favorable construction includes the presumption that the plaintiffs' general allegations of injury "embrace those specific facts that are necessary" to support the claim. As a result, general factual allegations of injury resulting from the statute and conduct challenged may suffice to establish the plaintiffs' standing. Lujan, 504 U.S. at 560-61.

1. Injury-In-Fact

The defendant argues that the faculty members' First and Fifth Amendment claims do not allege a cognizable injury in fact. He contends that the plaintiffs' First Amendment "message" is conduct, not speech, and thus not "legally and judicially cognizable," Def. Mem. at 11, and that their Fifth Amendment claim does not allege injury to a "legally protected interest" and thus must fail. Id. In effect, the defendant argues that the plaintiffs do not have standing because they cannot state a claim.

The essence of the standing "injury" requirement is that a plaintiff must "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." Baker v. Carr, 369 U.S. 186, 204 (1962). To qualify as a constitutionally sufficient injury-in-fact, the asserted injury must be "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" See Baur, 352 F.3d at 632 (quoting Lujan, 504 U.S. at 560). The court must assess whether the injury "affect[s] the plaintiff in a personal and individual way," id. (quoting Lujan, 504 U.S. at 560), and ensure that the plaintiffs' injury is not so abstract as to make

the claim incapable of, or otherwise not suitable for, judicial resolution. Id.

Contrary to the defendant's arguments, the faculty have alleged a constitutionally sufficient personal injury. The complaint alleges that they, by majority vote, govern the law school and establish its rules and regulations. See Compl. at ¶ 11. It further alleges that the faculty voted to include discrimination on the basis of sexual orientation in its Non-Discrimination Policy in 1978, and that this long-standing policy represents both their own message about discrimination, and their own determination about the standards of conduct that should govern the law school community. According to the complaint, the faculty were compelled to suspend that policy because of the threats leveled at their institution by the Department of Defense, in violation of their rights to freedom of speech and association. They further allege that the effect of the suspension is to impede the freedom of their relationships with their students, and to force them to participate in inflicting discrimination on those students. These alleged injuries are of a sufficiently "concrete" and "personal" nature to give the plaintiffs standing to pursue this action.

The defendant next argues that, even if the interest is "concrete," it is not "legally protected." McConnell v. Federal Election Com'n, 124 S.Ct. 619, 709 (2003) (quoting Lujan, 504 U.S. at 560). While this aspect of the standing inquiry "in no way depends on the merits of the plaintiffs contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted." Id. (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975) (internal quotation marks and citations omitted)). Essentially, this requirement inquires, "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiffs position a right to judicial relief." Warth, 422 U.S. at 500.

Courts have long recognized that the First Amendment can protect injuries to expressive conduct. See Stromberg v. California, 283 U.S. 359 (1931) (displaying red flag); Barnette v. West Virginia Bd. of Ed., 319 U.S. 624 (1943) (salute); Brown v. Louisiana, 383 U.S. 131 (1966) (sit in); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 504 (1969) (black armbands); Hurley v. Irish-Am. Gay, Lesbian, And Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (parade is expressive activity). Here, the faculty allege that their enactment of the NDP, and their decision to apply it to all aspects of law school life, including the recruitment process, is protected speech. They further allege that the Solomon Amendment, the DoD's regulations, and the defendant's application of those regulations against Yale and YLS, has forced them to choose between the exercise of their constitutional rights and federal funding for themselves, YLS, and Yale University. These allegations set forth a cognizable First Amendment injury.

The right to expressive association is "implicit in the right to engage in activities protected by the First Amendment." Roberts v. Jaycees, 468 U.S. 609, 622 (1984). This right includes the right not to associate, and government actions that force "intrusion into the internal structure or affairs of an association" may unconstitutionally burden this right. Id. at 623. The Supreme Court has observed that associational freedom is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000).

Plaintiffs allege that the DoD's actions have unconstitutionally forced them to allow military recruiters into their association, in violation of YLS's non-discrimination principles. They contend that they have a right to form and be part of an association that sends a particular message with regard to discrimination, and that because of the Solomon Amendment and the DoD's

enforcement of it, they are not only required to associate, but effectively to adopt the military's discriminatory message by association, unless they speak out against it. This also states a cognizable First Amendment injury. Id. at 653.

The plaintiffs' Fifth Amendment due process claim is more difficult. They contend that the Solomon Amendment, by requiring them to allow an employer on campus who discriminates against their students, "violat[es] the special relationship between student and teacher." Whatever the court's doubts about the due process claim under a Rule 12(b)(6) standard or on the merits, both the Supreme Court and Second Circuit have cautioned that a court may not pass a difficult jurisdictional issue in order to rule upon even an easy merits question. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-101 (1998); Center for Reproductive Law and Policy v. Bush, 304 F.3d 183, 195 (2d Cir. 2002) (court must reach jurisdiction unless "a controlling decision . . . has already entertained and rejected the same constitutional challenge to the same provision"); see also Warth, 422 U.S. at 500.

The Supreme Court has recognized, albeit in a limited circumstance, that the Fifth Amendment at times protects the teacher-student relationship. Meyer v. Nebraska, 262 U.S. 390 (1923). The plaintiffs are teachers; whether or not their stated claim ultimately falls within the contours of the Fifth Amendment, they have articulated a right that has been found to be cognizable. As a result, the Fifth Amendment "can be understood as granting persons in the plaintiff[s'] position a right to judicial relief." Warth, 422 U.S. at 500.[1]

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[1] The complaint also suggests that the faculty members attempt to raise the Fifth Amendment equal protection rights of their students. This would require the plaintiffs to demonstrate: (1) injury to the plaintiff; (2) a close relationship between the plaintiff and the third party that would cause the plaintiff to be an effective advocate for the third party's rights;

2. Causation

The defendant's principal argument against the plaintiffs' standing to bring this suit rests on the causation requirement. The defendant argues that the real "victim" of any conduct on its part is Yale University, which has declined to bring a claim, and that the plaintiffs cannot bring claims on Yale's behalf. The court disagrees with the defendant's characterization of the ongoing injury at issue here.

In order to bring a constitutionally justiciable claim, a plaintiff must, at the pleading stage, allege that the injury was "caused" by the conduct complained of. See Lujan, 504 U.S. at 560. Because the faculty plaintiffs allege that they, by majority, establish the rules and regulations that govern YLS, this makes them equivalent to YLS for the purposes of this causation inquiry. They thus allege an injury caused directly to themselves, as that YLS governing body. The plaintiffs allege that, as a result of threats aimed at their institution, and the associated ramifications for sister schools within Yale University, they have been forced to temporarily suspend the application of the NDP, in violation of their constitutional rights. Compl. at ¶ 4.

The record submitted by the defendant further makes clear that the Army and the DoD have consistently pointed to continuance or the permanent suspension of the NDP as the key indicator of Yale Law School's non-compliance or

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(3) some hindrance to the third party's ability to protect his or her own interests. Camacho v. Brandon, 317 F.3d 153, 159-60 (2d Cir. 2003). At oral argument, counsel conceded that the plaintiffs could not satisfy the hardship showing. Transcript 5/21/04 (Dkt. No. 47) at p. 66 1.24-25. The court thus treats any such third party claim, if articulated, as withdrawn.

In any case, the court has ruled that the students may pursue their own equal protection claims. See Ruling On Def.'s Rule 12(b)(1) Motion To Dismiss in SAME, et al, v. Rumsfeld, 03-cv-1867 (JCH).

compliance with the Solomon Amendment. See, e.g., Letter of Colonel Michele Miller to Richard Levin, 10/17/02, Def.'s Mem., Ex. B; Letter of Colonel Michele Miller to Richard Levin, 3/3/03, Def's Mem., Ex. B; Letter from William Carr to Richard Levin, 3/29/03, Def.'s Mem., Ex. B. This clearly alleges that their injury was "caused by" the conduct complained of. See Lujan, 504 U.S. at 560. Because the Complaint, the parties' statements at oral argument, and the documentary evidence before the court all suggest that the plaintiffs have the authority to retain or suspend the NDP, the court does not consider Yale University to be a "third party" interposed between the DoD and the plaintiffs in this matter.

Even if Yale University were to be considered such a "third-party," however, the plaintiffs would still have standing to pursue their claims.[2] While the defendant correctly notes that the causation required by Article III is not present where a plaintiffs injury results from the independent act of a third-party, the Supreme Court has cautioned the lower courts not to "wrongly equate[] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 169 (1997). The "fairly traceable" injury required by Article III may include "injury produced by determinative or coercive effect upon the action of someone else." Id.; see also Bush, 304 F.3d at 193. Here, the plaintiffs allege that they have been forced to suspend the NDP, in violation of their constitutional rights, because of the coercion of the DoD's threat to deprive itself and its sister schools at Yale University of federal funding. As a result,

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[2] Though Yale University is the primary victim of the imminent funding loss at issue here, the University, unlike the YLS faculty, appears to have no First Amendment rights in jeopardy (separate from the plaintiffs) in the matter as alleged. So, contrary to the defendant's argument, it is not at all clear that Yale University would be the preferred or even appropriate plaintiff here.

the plaintiffs' claimed injury is "fairly traceable" to the DoD's actions.

The plaintiffs therefore have standing to pursue their claims. The defendant's motion to dismiss for lack of standing is denied.

B. Ripeness

The defendant also argues that this action should be dismissed because the DoD has not yet issued a final determination as to Yale. The plaintiffs reply that this argument would "allow the DoD to achieve its oppressive purposes while shielding its illicit actions from judicial review," Pls' Opp. at 17, and that "absent immediate judicial review, the Faculty Members will continue to be deprived of their constitutional rights." Id. at 18.

Constitutional ripeness is "a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." Simmonds v. INS, 326 F.3d 351, 357 (2d Cir. 2003). "[T]he ripeness inquiry requires courts to consider both the fitness of the issues for judicial decision and the hardship resulting from withholding judicial consideration." Marchi v. Bd. of Coop. Educ. Services, 173 F.3d 469, 478-79 (2d Cir.1999) (citing Abbott Lab., 387 U.S. at 149); see also Able v. United States, 88 F.3d 1280, 1289-90 (2d Cir. 1996).

The Second Circuit has considered a variety of factors in evaluating whether a case is ripe for adjudication: (1) whether the issue to be reviewed is more legal or factual in nature; (2) whether the agency action is likely to have an immediate and substantial impact upon the complaining party; (3) whether judicial review would delay or impede effective enforcement or the relevant administrative scheme;

(4) whether the agency's actions are final, and (5) whether an adequate factual record has been established. Id. at 1289-90.

The plaintiffs' facial challenge to the statute need not be finally "applied" to be ripe for review. See id. at 1289 (finding resort to administrative procedures unnecessary because "[i]n a facial challenge, we need only consider whether there are any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act"); Dougherty v. Town of N. Hempstead Bd. of Zoning App., 282 F.3d 83, 90 (2d Cir. 2002) (citations omitted) (noting that facial First Amendment challenges implicate a somewhat relaxed standard for establishing the ripeness of a claim); Marchi, 173 F.3d at 478 (challenge that grows out of a "real, substantial controversy between parties" involving a "dispute definite and concrete" is ripe) (quoting Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298, (1979)).

Similarly, the plaintiffs' challenge to the regulation, on its face, and their claim that it is an unreasonable construction of the Solomon Amendment, raises no ripeness problem. Here, the regulation is final. To challenge a regulation, the Administrative Procedure Act ("APA") requires a party to show that the regulation has caused the plaintiff some concrete harm; in some cases, this may be satisfied by the promulgation of the regulation itself. See Reno v. Catholic Soc. Serv., Inc., 509 U.S. 43, 57 (1993). Here, the regulation has presented plaintiffs with an "immediate dilemma," id., and has further been applied to them by "some concrete action." See Lujan, 504 U.S. at 891. The challenge to the regulation is thus ripe.

The plaintiffs' "as applied" challenge presents greater difficulty. They argue that the DoD's interpretation of the statute and regulation, as expressed in the Carr letter and as applied to Yale, is in error, in excess of the DoD's authority under the statute, and infringes their Constitutional rights.

The defendant argues that, because federal agency action is involved, the standards of the APA are again implicated. The Principal Deputy has not definitively spoken and Yale's funding has not yet been ordered "terminated." Thus, the defendant argues, the action applying the regulation is not final, and the plaintiffs' claim is not yet ripe for adjudication.

The APA requires that an agency action be final before it can be reviewed. See Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003) ("The APA authorizes only a challenge to a 'final' action of an 'agency.'"); Air Espana v. Brien, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA explicitly requires that an agency action be final before a claim is ripe for review."). The APA's finality requirement is implicated where a suit asks the district court to review the propriety of an agency action. In re Combustion Equipment Associates, Inc., 838 F.2d 35, 38 (2d Cir. 1988). This requirement is jurisdictional. Air Espana, 165 F.3d at 152. The ripeness inquiry avoids "piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary." FTC v. Standard Oil Co. of California, 449 U.S. 232, 242 (1980). As a result, "[c]ourts traditionally have been reluctant to grant declaratory judgments when administrative determinations are involved unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties." Reno, 509 U.S. at 57 (quoting Abbott Labs., 387 U.S. at 148)) (internal quotation marks omitted).

Agency action is "ripe," however, when "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." Lujan, 504 U.S. at 891. Especially where the First Amendment is involved, "where a party suffers a concrete injury prior to final administrative disposition, such as fines

or unreasonable appeal fees, the claim may be considered sufficiently ripe." Peachlum v. City of York, 333 F.3d 429, 437 (3d Cir. 2003). As the Third Circuit noted in Peachlum, "We reiterate that an 'as applied' free speech claim has never been deemed subject to administrative finality doctrine by our court or any other court of appeals." Id. See also Dougherty, 282 F.3d at 90 (First Amendment claims require special caution because of the danger of irretrievable loss if not adjudicated).

This controversy, as it exists today, is the culmination of years of discussions and conflict between the DoD and Yale Law School. The DoD's letters state the Department's unwavering position that Yale's NDP is a violation of the Solomon Amendment, as construed by 32 C.F.R § 216.4(c)(3). Such letters can themselves have legal effect. Cf. United States v. Mead Corp., 533 U.S. 218 (2001) (agency's interpretive letters entitled to some level of deference). To the extent that any further discussion between Yale and the DoD has ensued since May 2003, the letters submitted to the court indicate that their character has been one of adjustment on Yale's part, not of reconsideration by DoD of its position that at least some access to the CDO is necessary for compliance. See, e.g., Letter from Charles Abell to Richard Levin, 12/23/03, Def.'s Mem., Ex. D.

Further, the DoD's action has worked "substantial hardship" on the plaintiffs and will continue to do so if judicial review is withheld. Letters from 2001 onward, culminating in the Carr letter and maintained in subsequent DoD letters, make clear the DoD's position that the YLS NDP puts Yale University's federal funding in peril. This forces the YLS faculty to chose whether to "stay silent" and "forever be barred from asserting [their] alleged free speech," Able, 88 F.3d at 1290, and due process rights, making the NDP suspension permanent and ensuring that the DoD's actions will never be reviewed, or whether to pursue those rights and cause the termination of their own federal funding

and that of all other schools at Yale University.[3] The plaintiffs have endured this hardship, and the temporary suspension of what they allege are their constitutional rights, for almost two years, through several recruiting seasons. Further, the issues here are primarily legal: particularly, does the Amendment require equal access, and does the DoD's required abridgement of the NDP violate the plaintiffs' rights? The controversy has thus developed to a point where judicial review is appropriate. See Abbott Labs., 387 U.S. at 149.

The gravamen of the defendant's argument is that the matter is not "final," and thus not ripe, until the Principal Deputy acts; however, as explained at oral argument, when the Principal Deputy acts, Yale will be listed as noncompliant and funding will be terminated almost immediately. Accepting the defendant's argument would thus be a decision that the plaintiffs' claims may only be brought on a last-minute Temporary Restraining Order, or, more likely, after Yale University has been deprived of over $300 million in federal funding. The court does not read the "ripeness" requirement to so confine plaintiffs' access to court under these circumstances. This controversy is ripe.

III. CONCLUSION

For the reasons stated above, the defendant's Motion to Dismiss [Dkt. No. 12] is DENIED in part. The court reserves its Ruling on the Rule 12(b)(6) portion of that Motion.

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[3] Plaintiffs' counsel represented during oral argument (and defendant's counsel did not dispute) that 166 law schools have, when faced with Carr-type letters, altered their policies and no "final" DoD action was necessary. Transcript, 5/21/04 (Dkt. No. 47) at p. 68 1.24 (plaintiffs' counsel) and p.73 II. 18-20 (defendant's counsel).

SO ORDERED.

Dated at Bridgeport, Connecticut this 9th day of June, 2004.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

APPENDIX D

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT A. BURT, et al., Plaintiffs,	:	
v.	:	Civil Action No. 3:03CV01777(JCH)
DONALD H. RUMSFELD, in his official capacity as United States Secretary Of Defense, Defendant.	:	Dated: April 1, 2005

NOTICE OF APPEAL

Defendant Donald H. Rumsfeld, in his official capacity as United States Secretary of Defense, through the undersigned counsel, gives Notice, this 1st day of April 2005, that Defendant hereby appeals to the U.S. Court of Appeals for the Second Circuit from the February 3, 2005 Judgment entered for plaintiffs, the January 31, 2005 Ruling on Plaintiffs' Motion for Summary Judgment [Dkt. No. 34] and Defendant's Motion to Dismiss [Dkt. No. 12], and the June 9, 2004 Ruling on Defendant's Rule 12(b)(1) Motion to Dismiss.

Respectfully submitted,

PETER D. KEISLER
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United States Attorney

VINCENT M. GARVEY
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Dated: April 1, 2005 /s/ Alan S. Modlinger

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APPENDIX E

SOLOMON AMENDMENT

10 U.S.C.A. § 983

Effective: October 28, 2004

United States Code Annotated Currentness
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
+ Part II. Personnel (Refs & Annos)
+ Chapter 49. Miscellaneous Prohibitions and Penalties

>> § 983. Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies

(a) Denial of funds for preventing ROTC access to campus.--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) Denial of funds for preventing military recruiting on campus.--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if

the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) Exceptions.--The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that--

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) Covered funds.--(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(C) Any funds made available for the Department of Homeland Security.

(D) Any funds made available for the National Nuclear Security Administration of the Department of Energy.

(E) Any funds made available for the Department of Transportation.

(F) Any funds made available for the Central Intelligence Agency.

(2) Any Federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

(e) Notice of determinations.--Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary--

(1) shall transmit a notice of the determination to the Secretary of Education, to the head of each other department and agency the funds of which are subject to the determination, and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) Semiannual notice in Federal Register.--The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).

CREDIT(S)

(Added Pub.L. 104-106, Div. A, Title V, § 541(a), Feb. 10, 1996, 110 Stat. 315, and amended Pub.L. 106-65, Div. A, Title V, § 549(a)(1), Title X, § 1067(1), Oct. 5, 1999, 113 Stat. 609, 774; Pub.L. 107-296, Title XVII, § 1704(b)(1), (3), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 108-375, Div. A, Title V, § 552(a) to (d), Oct. 28, 2004, 118 Stat. 1911.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Conference Report No. 104-450, see 1996 U.S. Code Cong. and Adm. News, p. 238.

1999 Acts. House Conference Report No. 106-301 and Statement by President, see 1999 U.S. Code Cong. and Adm. News, p. 94.

2002 Acts. House Report No. 107-609(Part I) and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 1352.

2004 Acts. House Conference Report No. 108-767, see 2004 U.S. Code Cong. and Adm. News, p. 1961.

Statement by President, see 2004 U.S. Code Cong. and Adm. News, p. S37.

Codifications

Section 1067(1) of Pub.L. 106-65, directing that subsec. (b)(1) of this section be amended by substituting "Committee on Armed Services" for "Committee on National Security",

was incapable of execution due to prior amendment by section 549(a)(1) of Pub.L. 106-65 which completely revised this section.

Amendments

2004 Amendments. Subsec. (a). Pub.L. 108-375, § 552(d), struck out "(including a grant of funds to be available for student aid)" following "by contract or by grant".

Subsec. (b). Pub.L. 108-375, § 552(b)(2)(A), struck out "subsection (d)(2)" and inserted "subsection (d)(1)".

Pub.L. 108-375, § 552(d), struck out "(including a grant of funds to be available for student aid)" following "by contract or by grant".

Subsec. (b)(1). Pub.L. 108-375, § 552(a), struck out "entry to campuses" and inserted "access to campuses", and inserted before the semicolon at the end "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer".

Subsec. (d)(1). Pub.L. 108-375, § 552(c)(1), struck out "The" after "(1)" and inserted "Except as provided in paragraph (2), the".

Pub.L. 108-375, § 552(b)(1)(A)(i), struck out "limitation established in subsection (a) applies" and inserted "limitations established in subsections (a) and (b) apply".

Subsec. (d)(1)(B). Pub.L. 108-375, § 552(b)(1)(A)(ii), inserted "for any department or agency for which regular appropriations are made" after "made available".

Subsec. (d)(1)(C) to (F). Pub.L. 108-375, § 552(b)(1)(A)(iii), added subpars. (C) to (F).

Subsec. (d)(2). Pub.L. 108-375, § 552(b)(1)(B), (c)(2), added par. (2), and struck out former par. (2), which read:

"(2) The limitation established in subsection (b) applies to the following:

"(A) Funds described in paragraph (1).

"(B) Any funds made available for the Department of Homeland Security."

Subsec. (e)(1). Pub.L. 108-375, § 552(b)(2)(B), inserted ", to the head of each other department and agency the funds of which are subject to the determination," after "Secretary of Education".

2002 Amendments. Subsec. (b)(1). Pub.L. 107-296, § 1704(b)(1), struck out "of Transportation" each place it appeared and inserted "of Homeland Security".

Subsec. (d)(2)(B). Pub.L. 107-296, § 1704(b)(3), struck out "Department of Transportation" and inserted "Department of Homeland Security".

1999 Amendments. Pub.L. 106-65, § 549(a)(1), rewrote this section which formerly read:

"§ 983. Institutions of higher education that prohibit Senior ROTC units: denial of Department of Defense grants and contracts

"**(a) Denial of Department of Defense grants and contracts.—(1)** No funds appropriated or otherwise available to the Department of Defense may be made obligated by contract or by grant (including a grant of funds to be available for student aid) to any institution of higher education that, as determined by the Secretary of Defense, has an anti-ROTC policy and at which, as determined by the Secretary, the Secretary would otherwise maintain or seek to establish a unit of the Senior Reserve Officer Training Corps or at which the Secretary would otherwise enroll or seek to enroll students for participation in a unit of the Senior

Reserve Officer Training Corps at another nearby institution of higher education.

"**(2)** In the case of an institution of higher education that is ineligible for Department of Defense grants and contracts by reason of paragraph (1), the prohibition under that paragraph shall cease to apply to that institution upon a determination by the Secretary that the institution no longer has an anti-ROTC policy.

"**(b)** Notice of determination.--Whenever the Secretary makes a determination under subsection (a) that an institution has an anti-ROTC policy, or that an institution previously determined to have an anti-ROTC policy no longer has such a policy, the Secretary--

"**(1)** shall transmit notice of that determination to the Secretary of Education and to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives; and

"**(2)** shall publish in the Federal Register notice of that determination and of the effect of that determination under subsection (a)(1) on the eligibility of that institution for Department of Defense grants and contracts.

"**(c)** Semiannual notice in Federal Register.--The Secretary shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for Department of Defense grants and contracts by reason of a determination of the Secretary under subsection (a).

"**(d)** Anti-ROTC policy.--In this section, the term "anti-ROTC policy" means a policy or practice of an institution of higher education that--

"**(1)** prohibits, or in effect prevents, the Secretary of Defense from maintaining or establishing a unit of the Senior Reserve Officer Training Corps at that institution, or

"(2) prohibits, or in effect prevents, a student at that institution from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education."

Subsec. (b)(1). Pub.L. 106-65, § 1067(1), which directed the substitution of "Committee on Armed Services" for "Committee on National Security", could not be executed due to prior amendment by Pub.L. 106-65, § 549(a)(1). See Codifications note set out under this section.

Effective and Applicability Provisions

2004 Acts. Pub.L. 108-375, Div. A, Title V, § 552(f), Oct. 28, 2004, 118 Stat. 1912, provided that: "The amendments made by this section [amending this section and repealing provisions, set out as a note under this section] shall apply with respect to funds appropriated for fiscal year 2005 and thereafter."

2002 Acts. Amendments by Pub.L. 107-296, § 1704, effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see Pub.L. 107-296, § 1704(g), set out as an Effective and Applicability Provisions note under 10 U.S.C.A. § 101.

Change of Name

The Committee on National Security of the House of Representatives was changed to the Committee on Armed Services of the House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999, 145 Cong. Rec. H6- 10.

Availability of Funds for Student Financial Assistance

Pub.L. 106-79, Title VIII, § 8120, Oct. 25, 1999, 113 Stat. 1260, provided that during the current fiscal year and hereafter, any Federal grant of funds to an institution of higher education to be available solely for student financial

assistance or related administrative costs may be used for the purpose for which the grant is made without regard to any provision to the contrary in section 514 of the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1997 (10 U.S.C. 503 note), or section 983 of title 10, United States Code, was repealed by Pub.L. 108-375, Div. A, Title V, § 552(e), Oct. 28, 2004, 118 Stat. 1912.

10 U.S.C.A. § 983, 10 USCA § 983

Current through P.L. 109-7 approved 04-15-05

APPENDIX F

CONSTITUTION OF THE UNITED STATES— AMENDMENT I

CONSTITUTION OF THE UNITED STATES—AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

CONSTITUTION OF THE UNITED STATES— AMENDMENT V

CONSTITUTION OF THE UNITED STATES—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

LUSTIG-PREAN AND BECKET V. THE UNITED KINGDOM, APP. NOS. 31417/96, 3277/96 (EUR. CT. OF HUMAN RIGHTS, THIRD SECTION, 1994)

***601 Lustig-Prean** and Beckett v. **United Kingdom**
(Art. 41)
Application Nos 31417/96 and 32377/96

Before the European Court of Human Rights

ECHR

(The President, Judge JP Costa; Judges Fuhrmann,
Loucaides, Kuris, Bratza,
Greve, Traja)

25 July 2000

H1 Relying on Article 41 of the Convention, the applicants claimed just satisfaction for violations of Article 8 resulting from the investigations into their sexual orientation and their subsequent discharge from the Royal Navy in pursuance of Ministry of Defence policy against homosexuals in the armed forces.

Held:

H2 (1) by six votes to one:

(a) that the respondent State should pay the first applicant, within three months from the date on which the judgment became final according to Article 44(2) of the Convention, the following amounts:

-- £19,000 in respect of non-pecuniary damage;

-- £94,875 in respect of pecuniary damage;

-- £18,000 for the costs and expenses of the domestic proceedings (inclusive of VAT);

-- £16,000 for the costs and expenses of the proceedings before the Convention organs (inclusive of VAT), less amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8 per cent be payable from the expiry of the above-mentioned three months until settlement;

H3 (2) by six votes to one:

(a) that the respondent State should pay the second applicant, within three months from the date on which the judgment became final according to Article 44(2) of the Convention, the following amounts:

-- £19,000 in respect of non-pecuniary damage;

-- £55,000 in respect of pecuniary damage;

-- £15,000 for the costs and expenses of the proceedings before the Convention organs (inclusive of VAT), less the amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8 per cent be payable from the expiry of the above-mentioned three months until settlement;

H4 (3) unanimously that the remainder of the applicants' claims for just satisfaction be dismissed.

***602** 1. **Just satisfaction: non-pecuniary loss; grave interferences with private lives; assessment on an equitable basis; interest (Art. 41).**

H5 (a) In its principal judgment, the Court found that the investigations and consequent discharges constituted, "especially grave" interferences with the applicants' private lives for three reasons. First, the investigation process was of an "exceptionally intrusive character", certain lines of questioning being "particularly intrusive and offensive". Secondly, the discharge of the applicants had a "profound effect on their careers and prospects". Thirdly, the Court found the absolute and general character of the policy striking, leading as it did to the discharge of the applicants on

the grounds of an innate personal characteristic irrespective of their conduct or service records. It is clear that the investigation and discharges described in the principle judgment were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. [12]

H6 (b) Compensation for non-pecuniary damage is awarded on an equitable basis. An award of interest is not, given the nature of the loss to which it relates. In the circumstances of the case, the Court does not accept the second applicant's claim for aggravated damages. [12]

2. **Just satisfaction: pecuniary loss; restitutio in integrum; past and future loss; assessment on an equitable basis; interest (Art. 41).**

H7 (a) In principle, a judgment in which the Court finds a violation of the Convention imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. In the present case, however, a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain character of the damage flowing from the violation. While the Court does not accept the Government's contention that no award should be made in respect of future losses given the large number of imponderables involved in its assessment, it is nevertheless the case that the greater the interval since the discharge of the applicants the more uncertain the damage becomes. Accordingly, the question to be decided is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable. [22]-[23]

H8 (b) In concluding that the discharge of the applicants had a profound effect on their careers and prospects, the Court referred to their "relatively successful service careers in its particular field", their length of service, their rank on discharge and their "very positive" service records prior to and after discharge. It went on to note the unique nature of the armed forces, a matter which had been underlined by the Government in its pleadings before the Court, and the consequent difficulty in directly transferring essentially military qualifications and experience to civilian life. The significant differences between service and civilian life and qualifications, the emotional and psychological impact of the investigations and the consequent discharges, together with the lack of access to the armed forces' resettlement services, rendered ***603** it difficult for the applicants to find civilian careers which were, and would continue to be, equivalent to their service careers. [24]

H9 (c) The first applicant began his career in the armed forces in 1982 when he was 23 years old. After more than 12 years' service the armed forces had become his principal career and he was a lieutenant-commander when discharged in January 1995, earning a gross annual salary of approximately £30,000. His transfer to the "general list" in 1989 meant, in principle, a likely naval career until 2012. He had a 70 per cent chance of promotion to commander in 2001, although the parties are divided on the chances of further promotion to captain. He was unemployed for just over a year since discharge, having worked in a number of positions prior to November 1997 when he became self-employed. His property management company showed a profit of £7,135 (before tax) for the financial year ending in March 1999. The second applicant joined the armed forces in 1989 when he was 18 years old, enlisting for 22 years. In 1991 he became a Weapons Engineering Mechanic (Radio) and on discharge in July 1993 he was in receipt of a gross annual salary of approximately £17,000. While his service prospects were disputed, the Government accepted that, if he

had not voluntarily left service, his termination date would likely have been 2011 prior to which he would likely have been confirmed as a Leading Weapons Engineering Mechanic by 2001 and as a Petty Officer Weapons Engineering Mechanic by 2008. Since discharge, he had essentially two six-month paid positions prior to his employment by the police in June 1996. He remains in the police force and accepted that his likely promotion to sergeant would mean that his police earnings would probably exceed his potential service earnings by 2003-2004. [25]

H10 (d) The loss to the applicants of the non-contributory service pension scheme is also significant. The lump sum and service pension which the first applicant will receive on retirement are substantially less than the amounts he would have received had he not been discharged, even if he had not achieved his predicted promotions before retirement. The contributions which would be required in order to achieve an equivalent level of pension from a private pension scheme are likely to be considerable. While the second applicant was able to transfer the accrued benefits of his service pension to the police pension scheme, the latter scheme, unlike the former, is a contributory scheme into which the applicant pays almost 11 per cent of his salary. The applicants can reasonably claim some compensation for the loss associated with the termination of their participation in the non-contributory service pension scheme from the date of their discharges on 17 January 1995 and 28 July 1993, respectively. The amount of the loss is necessarily speculative, depending as it does on, *inter alia,* the period during which the applicants would have remained in service and on their rank at the time of leaving service. [26]

H11 (e) The Court notes that the applicants' claims as regards the promotion bonus and the two open engagement bonuses are not disputed by the Government, and that these payments were to become effective prior to the agreed likely dates of the applicants' retirement from service. [28]

H12 (f) Interest can be claimed from the dates on which each element of past pecuniary damage accrued. [28]

H13 (g) Compensation (including interest) is awarded on an equitable basis ***604** in respect of past loss of earnings, future loss of earnings and loss of the benefit of the non-contributory service pension scheme. [29]

3. **Just satisfaction: costs and expenses; criteria for recovery; assessment on an equitable basis; default interest (Art. 41).**

H14 (a) Only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention. [32]

H15 (b) With regard to the domestic judicial review proceedings, the first applicant was entitled to instruct such lawyers as he chose and the Court notes that legal aid regulations obliged him to bear a proportionate amount of the overall costs of the proceedings. Nevertheless, the four applicants in those proceedings were represented by a total of two Q.C.s, four junior counsel and three firms of solicitors whereas the issues raised by each applicant were substantially the same. Given the potential for efficient co-ordination between those legal representatives, the charges for the services of the total number of fee earners representing the first applicant cannot all be considered to have been "necessarily incurred" or to be "reasonable as to quantum". [32]

H16 (c) Costs and expenses are awarded on an equitable basis. [33]

H17 (d) With regard to the Convention proceedings, the Court's finding that an admissible complaint does not give rise to a separate issue does not of itself imply that the associated legal costs were not necessarily incurred or were unreasonable as to quantum. This is particularly so when the

submissions of the parties on that complaint were not extensive. [36]

H18 (e) The Court does not accept the Government's contention that the nature of the applicants' submissions to the domestic courts in the judicial review proceedings and to Strasbourg under the Convention were substantially the same. It also recalls that the report of the Homosexuality Policy Assessment Team, which was published after the domestic proceedings had terminated, formed the basis of the Government's core arguments in Strasbourg and was reasonably the subject of substantial submissions by the applicants. [36]

H19 (f) However, the issues in the applicants' cases were very similar. In addition, by far the greater part of counsels' fees claimed related to the Q.C.s common to both applicants who carried out a significant amount of the legal work associated with the Convention proceedings. The resulting similarity and overlap between the main written and oral submissions of both applicants is not adequately reflected in the costs claimed by them. Moreover, and even accepting that the applicants were entitled to be represented by separate firms of solicitors, the costs claimed as regards the work done by the solicitors do not take sufficient account of the similarity of the cases and the potential for efficient co-ordination between those legal representatives. Furthermore, the form of the applicants' initial Article 41 submissions, together with the general principles expressed therein, were sufficiently similar to indicate that they resulted from substantial co-operation between the legal representatives. Given this, the costs claimed by the first applicant in this respect appear excessively high. The Court has also taken into account the fact that the second applicant claimed, but did not specify a particular sum for, the legal costs and expenses of his Article 41 submissions. However, given the similarity between ***605** these submissions of the applicants, the Court can assess the second applicant's costs

and expenses in this respect from the sums claimed by the first applicant. [37]

H20 (g) Accordingly, the legal costs and expenses for which the applicants claim reimbursement cannot all be considered to have been "necessarily" incurred or to be "reasonable as to quantum". Costs and expenses are awarded on an equitable basis. [38]-[39]

H21 (h) The statutory rate of interest applicable in the **United Kingdom** is 8 per cent per annum. [40]

H22 The following cases are referred to in the Court's judgment:

1. Cable and Others v. **United Kingdom:** (2000) 30 E.H.R.R. 1032.

2. Jordan v. **United Kingdom:** 14 March 2000.

3. **Lustig-Prean** and Beckett v. **United Kingdom:** (2000) 29 E.H.R.R. 548.

4. Nikolova v. Bulgaria: (2001) 31 E.H.R.R. 3.

5. Papamichalopoulos and Others v. Greece (former Art. 50) (A/330-B): (1996) 21 E.H.R.R. 439.

6. Selçuk and Asker v. Turkey: (1998) 26 E.H.R.R. 477.

7. Smith and Grady v. **United Kingdom:** (2000) 29 E.H.R.R. 493.

8. The Observer and the Guardian v. **United Kingdom** (A/216): (1992) 14 E.H.R.R. 153.

9. The Sunday Times v. **United Kingdom** (former Art. 50) (A/38): (1981) 3 E.H.R.R. 317.

10. Vogt v. Germany (A/142): 26 October 1988, Series A No. 142, p. 29.

11. Young, James and Webster v. **United Kingdom** (former Art. 50) (A/55): (1983) 5 E.H.R.R. 201.

Having consulted the parties, the Court decided not to hold a separate hearing on the question of just satisfaction.

The Facts

1 The case originated in two applications [FN1] against the **United Kingdom** lodged on 23 April 1996 and 11 July 1996, respectively with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr Duncan **Lustig-Prean** and Mr John Beckett ("the first and second applicants").

FN1 App. Nos 31417/96 and 32377/96.

2 In its judgment of 27 September 1999 ("the principal judgment"), the Court held that there had been a breach of Article 8 of the Convention as regards the investigations conducted into the applicants' sexual orientation by the armed forces and as a result of their subsequent discharge from the armed forces on the grounds of their homosexuality in pursuance of the Ministry of Defence policy against homosexuals in the armed forces. No separate issue was found to arise under Article 14 of the Convention. [FN2] On the same day, the Court delivered judgment in two similar applications challenging the same policy of the Ministry of Defence, the Court concluding, *inter alia*, as to a violation of Articles 8 and 13 of the Convention. [FN3]

FN2 **Lustig-Prean** and Beckett v. **United Kingdom:** (2000) 29 E.H.R.R. 548 ***606** , paras 105 and 109.

FN3 Smith and Grady v. **United Kingdom:** (2000) 29 E.H.R.R. 493, paras 112 and 139.

3 Claims for just satisfaction pursuant to Article 41 of the Convention had been submitted by the applicants in April and August 1999 and the Court had agreed to provide time to the parties to make further submissions in this respect. Accordingly, in the principal judgment the Court found that the question raised under Article 41 was not ready for decision and that it was necessary, account being taken of the possibility of an agreement between the parties, to reserve the question of just satisfaction. [FN4]

FN4 Para. 113 of the principal judgment and part 3 of its operative provisions.

JUDGMENT

7 Article 41 of the Convention reads as follows:

If the Court finds that there has been a violation for the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

8 The applicants submitted that the Court's finding of a violation could not compensate them for the losses sustained. Both claimed compensation for pecuniary and non-pecuniary losses and reimbursement of legal costs and expenses, the second applicant also requesting reinstatement. They argued that the Court should seek to put them, in so far as possible, in the position in which they would have been had they not been discharged, such an approach being consistent with that of the European Court of Justice and of the domestic courts in discrimination cases, as well as with the principles flowing from Articles 13 and 41 of the Convention.

9 The Government accepted, in principle, a monetary award in the case but contested the applicants' assessments. It also considered that, while the Court's jurisprudence acknowledges the principle of *restitutio in integrum,* it also

provides for a broader and more flexible approach to compensation, particularly where the Court is invited to speculate as to what might occur in the future.

A. Non-pecuniary loss

10 The applicants submitted that the investigation conducted was a serious and insulting intrusion into an intimate aspect of their private lives and they pointed out that they were deprived of their chosen careers in a profession in which they excelled, in which they were destined for further promotion and from which they derived considerable job satisfaction. They underlined that they were discharged, not because of their conduct or service records, but because of a private and intrinsically unobjectionable characteristic which they desired to keep private.

The first applicant claimed £22,500 compensation for the non-pecuniary loss suffered, together with interest at 8 per cent per annum. He submitted a report of an Occupational Psychologist as evidence of ***607** the devastating psychological effect on him of the investigation and his discharge. He was particularly offended by the termination of his commission which severed all his links with the service and by the fact that he cannot wear his uniform or use his rank in the future.

The second applicant claimed compensation of £25,000 for non-pecuniary loss and £20,000 compensation for "aggravated damages", together with interest on those amounts at 8 per cent per annum. He emphasised the prurient detail in which he was questioned by the service police, recalled that his locker was searched and his personal belongings seized, argued that the conduct of the service police was homophobic, grossly unprofessional, oppressive and voyeuristic, and noted that the Government accepted during the oral hearing before this Court that certain questions put to him could not be defended.

He further referred to the fact that he was sent to the Surgeon Commander Psychiatrist where aversion treatment and electric shocks were mentioned, the applicant submitting that the treatment of his sexual orientation as a form of mental illness was deeply distressing for him. Aggravated damages were requested given the "high-handed" manner of his discharge which caused him profound anxiety, the inappropriate nature of his referral to a psychiatrist and the late concession by the Government as to the indefensible nature of certain questions put to him. He also submitted extracts from his medical records (from April 1994 to February 1995) attesting to his psychological difficulties subsequent to discharge.

11 The Government considered the amounts claimed by the applicants to be excessive and suggested an award in the region of £10-15,000, interest not being required to achieve fair compensation, as it does not reflect sums spent or lost by the applicants.

12 The Court recalls that, in its principal judgment, it found that the investigations and consequent discharges constituted "especially grave" interferences with the applicants' private lives [FN5] for three reasons. In the first place, the Court considered that the investigation process was of an "exceptionally intrusive character", noting that certain lines of questioning were "particularly intrusive and offensive". Secondly, the Court considered that the discharge of the applicants had a "profound effect on their careers and prospects" and, thirdly, it found the absolute and general character of the policy striking, leading as it did to the discharge of the applicants on the grounds of an innate personal characteristic irrespective of their conduct or service records. [FN6] The principal judgment also noted that the High Court, in its judgment delivered on 7 June 1995 in the domestic judicial review proceedings, had described the applicants' service records as "exemplary", [FN7] and had

found that the applicants had been "devastated" by their discharge. [FN8]

FN5 Para. 83 of that judgment.

FN6 Paras 84, 85 and 86.

FN7 Para. 85.

FN8 Para. 23.

***608** The Court considers it clear that the investigation and discharges described in the principle judgment were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. The Court therefore awards, on an equitable basis, £19,000 to each applicant in compensation for non-pecuniary damage. It does not consider an award of interest on this sum to be appropriate given the nature of the loss to which it relates. In addition, the Court does not, in the circumstances of the present case, accept the second applicant's claim for aggravated damages. [FN9]

FN9 Cable and Others v. **United Kingdom:** (2000) 30 E.H.R.R. 1032, para. 30, and Selçuk and Asker v. Turkey: (1998) 26 E.H.R.R. 477, para. 119.

B. Pecuniary loss

13 Both applicants claimed compensation for past and future pecuniary loss, the second applicant adding reinstatement as his first option. Their pecuniary loss claims related to the difference between their civilian income and benefits (past and future) and their service income and benefits had they not been discharged. The past pecuniary losses are claimed to have accrued over the periods January 1995 to April 1999 and July 1993 to May 1999, respectively, after which periods future pecuniary loss began to accrue. These submissions were detailed and reasoned but the

applicants recognised the need for expert evidence which they could not afford to obtain.

14 The first applicant, currently self-employed and managing his own property company since November 1997, claimed a figure of £61,518.86 (before tax) in compensation for past loss of earnings. He also claimed £4,875 in compensation for the promotion bonus that was recouped on his discharge because that bonus was conditional on his remaining in service for three years after promotion. He submitted that, as a result of the short notice of discharge given, he could not use the armed forces' resettlement services, he had to find work quickly to fund his mortgage and living expenses and he could not, therefore, pursue further qualifications. He also argued that, despite this, he had made real attempts to obtain civilian employment, making 300 job applications and attending 50 interviews. The Occupational Psychologist's report submitted by him emphasised the psychological impact of the discharge, the inherent differences between service and civilian life, together with the unavailability to the first applicant of the armed forces' resettlement services, which factors explained his significantly less successful employment record since discharge when compared to his prior naval career.

The second applicant, employed by the police since June 1996, claimed £69,610.18 (net of tax) in compensation for loss of earnings in the past. He also claimed £6,000 in respect of two open engagement bonuses which were due in 1993 and 1996. He maintained that he ***609** would already have been promoted to Mid-Shipman (Petty Officer). He submitted that his attempts to find civilian employment were hampered by the psychological impact of losing his chosen career, [FN10] by his lack of access to the armed forces' resettlement services and by the length of time the Admiralty Board took to decide on his petition against discharge, pending which he sought essentially temporary civilian

positions as he continued to hope that he would return to service.

FN 10 Referring to the extracts from his medical file noted at para. 10 above.

15 The applicants also claimed £204,650 (before tax) and £17,024 (it is not clear whether this is net of tax or not), respectively, by way of compensation for future loss of earnings.

The first applicant's calculations were based on the assumptions that he would have stayed in service at least until 2014, and that there was a 90 per cent chance that he would have been promoted to commander in 1999 and to captain in 2004, with his retirement being consequently at 55 years of age or later. He submitted that his assumptions were fair given his commitment to his naval career, his excellent work history, his good health and his extremely positive service evaluations. He also assumed significant growth in his property business, including a 6 per cent growth rate from 2005. He argued that all his calculations were set conservatively, making assumptions most favourable to the Government.

The second applicant maintained that, after his Mid-Shipman (Petty Officer) promotion, he would probably have gone on to reach office status. This would, in turn, have led to his eligibility for transfer to the general list, in which case the likelihood was that he would have stayed in service until his retirement at 55 years of age or later. He stated that he was completely committed to his naval career and to achieving the promotion that would prolong his engagement and that, given his exemplary work history and evaluation reports, there was an 80 per cent chance of his being retained in service until retirement. Despite these predictions, the second applicant's calculations were based only on his promotion to Mid-Shipman (Petty Officer), on completion of the initial 22-year engagement, on an annual rise of 3 per

cent in his service salary and on his police salary exceeding his service earnings in the year 2003-2004 when he would probably be promoted to police sergeant. His calculations also took account of added accommodation expenses as a civilian.

16 Furthermore, the applicants also claimed to have suffered past and future damage with the loss of the non-contributory service pension scheme, basing their calculations on the same service and civilian career prospects.

The first applicant claimed £494,119.98 compensation in this respect. He emphasised the value of a non-contributory pension scheme and he pointed out that, as a self-employed person, he would have to make ***610** large contributions to a pension scheme to achieve the same pension benefits on retirement, for most of which contributions he would not obtain tax relief. The compensation claimed related to the service terminal grant (lump sum) he would have obtained on retirement together with pension payments for 15 years thereafter.

The second applicant transferred his pension benefits to the police pension scheme in September 1996. However, that latter scheme is a contributory scheme to which he pays almost 11 per cent of his salary and he, accordingly, claims compensation for his past and future pension losses. He could not quantify this because of the need for expert assistance which he could not afford.

17 Finally, both applicants claimed interest at 8 per cent per annum from the dates of their discharge on all past pecuniary loss sums claimed.

18 The Government accepted that there may be cases where it would be appropriate to award some compensation for pecuniary loss in this sort of context. However, it disagreed with certain principles, assumptions and

calculations underlying the applicants' assessments and, accordingly, with the levels of compensation claimed by the applicants. It did not comment on the second applicant's request for reinstatement.

19 As to the past loss of earnings claimed by the first applicant, the Government was prepared to accept his civilian earnings since discharge as submitted, and they also accepted the earnings of a naval lieutenant commander relied on by him. However, it took issue with his past employment choices, submitting that he could not claim that all past earnings' losses flowed directly from his discharge. It accepted that the discharge would have had an emotional impact on him but argued that there was nothing to suggest that he could not have overcome this to better readjust to civilian life within a relatively short period of time. Referring to the transferable skills the first applicant obtained in service, the Government argued that his progress since discharge had not mirrored that of other officers of similar rank who had left the Royal Navy.

As to the future loss of earnings claimed by the first applicant, the Government relied on a service career forecast completed in respect of the first applicant by the armed forces in May 1999. It contested his career and length of service assumptions, arguing that these are not easy to reconcile with his service record, his job history since discharge and his personality traits which his own Occupational Psychologist described. It accepted a likely termination of service date of 2012, suggested his chances of promotion to commander were 70 per cent in 2001, and considered that he only had a 3 per cent chance of onward promotion to captain. The first applicant's business was relatively new and, according to the Government, there was therefore unlimited scope for growth or disaster. However, the property market and economic conditions were stable so that there was no reason to assume ***611** that the revenue from that business would not, in the future, outweigh the

sums he would have earned in service. The Government would limit the causal connection between the first applicant's discharge and loss of earnings to five years, and submitted that no award should be made in relation to future earnings, given the large number of imponderables involved in its assessment.

As to the first applicant's pension, the Government confirmed that, on discharge, he had accrued a terminal grant of £16,057.97 and a pension of £5,350.80 per annum, such sums being index-linked and payable at 60 years of age. Had the first applicant served until 2009, those sums would have amounted to £46,473.69 and £15,491.23, respectively. The above submissions on his service prospects were repeated in relation to his claim of pension losses after the date of discharge. The Government added that pension loss should be treated as future loss and should be calculated on the basis of contributions the armed forces would have made to the service pension scheme on the first applicant's behalf, and not on the basis of the loss of a lump sum and annual payments on retirement. The Government considered, moreover, that the first applicant had the opportunity to fund a pension up to the level of benefits which would have been provided by the service pension scheme.

20 As to the second applicant, the Government relied on its submissions on the first applicant's claims. It contested his assumptions about his service prospects, submitting that the rate of voluntary discharge of persons of the applicant's rank and position was such that there was only a 23 per cent chance of h[im] remaining in service after 2000. However, if he had remained in service, it was likely that he would have been confirmed as Leading Weapons Engineering Mechanic by 2001 and as a Petty Officer Weapons Engineering Mechanic by 2008, his chances of promotion thereafter to Chief Petty Officer being assessed at only 10 per cent. In addition, it questioned the second applicant's attempts at finding employment before June

1996. As to his pension claim, they confirmed that on discharge he had accrued a terminal grant of £2,275.77 and a pension of £758.59 per annum, which benefits were transferred to the police pension scheme. They added that there was no reason to suppose that his pension benefits would be significantly different in the police.

21 In sum, the Government submitted that, given the uncertainty involved in the above assessments, a broad approach to the applicants' claims for pecuniary loss was both inevitable and desirable. Maximum awards for any pecuniary damage sustained were proposed by the Government in the sum £20,000-25,000, for the first applicant, and in the sum of £15,000-20,000 for the second applicant.

22 The Court recalls that, in principle, a judgment in which the Court finds a violation of the Convention imposes on the respondent State a ***612** legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. [FN11]

FN11 Papamichalopoulos and Others v. Greece (former Art. 50) (A/330-B): (1996) 21 E.H.R.R. 439, para. 34.

However, in the present case, a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain character of the damage flowing from the violation. [FN12] While the Court does not accept the Government's contention that no award should be made in respect of future losses given the large number of imponderables involved in its assessment, it is, nevertheless, the case that the greater the interval since the discharge of the applicants the more uncertain the damage becomes.

FN12 Young, James and Webster v. **United Kingdom** (former Art. 50) (A/55): (1983) 5 E.H.R.R. 201, para. 11.

23 Accordingly, the Court considers that the question to be decided is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable. [FN13]

FN13 The Sunday Times v. **United Kingdom** (former Art. 50) (A/38): (1981) 3 E.H.R.R. 317, para. 15.

24 The Court recalls, in particular, paragraph 85 of the principal judgment where it explained why it considered that the discharge of the applicants "had ... a profound effect on their careers and prospects". It referred to the applicants' "relatively successful service careers in their particular field", to their length of service, to their rank on discharge and to their "very positive" service records prior to and after discharge. In this latter respect, the Court noted that the Government had accepted that neither of the applicants' service records nor their conduct gave any grounds for complaint, and that the High Court in the domestic judicial review proceedings described their service records as "exemplary". That domestic court had also pointed out that there was no reason to doubt that, had the applicants not been discharged, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. [FN14]

FN14 Para. 23 of the principal judgment.

The Court then went on to note [FN15] the unique nature of the armed forces, a matter which had been underlined by the Government in its pleadings before the Court, and the consequent difficulty in directly transferring essentially military qualifications and experience to civilian life. It recalled that one of the reasons why it considered Mrs

Vogt's dismissal from her post as a school teacher to be a "very severe measure", was the finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole ***613** profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience". [FN16]

FN15 Also in para. 85 of the principal judgment.

FN16 Vogt v. Germany (A/142): 26 October 1988, para. 60.

The Court is of the opinion that the significant differences between service and civilian life and qualifications, the emotional and psychological impact of the investigations and the consequent discharges, [FN17] together with the lack of access to the armed forces' resettlement services, rendered it difficult for the applicants to find civilian careers which were, and would continue to be, equivalent to their service careers.

FN17 See para. 12 above.

25 The parties disagreed on the assumptions upon which the assessment of the pecuniary loss claims depended and, in particular, on the applicants' service and civilian career prospects after discharge.

However, it is not disputed that the first applicant began his career in the armed forces in 1982 when he was 23 years old, that after more than 12 years' service the armed forces had become his principal career and that he was a lieutenant-commander when discharged in January 1995, earning a gross annual salary of approximately £30,000. The Government also accepted that the first applicant's transfer to the "general list" in 1989 meant, in principle, a likely naval career until 2012, and that he had a 70 per chance of promotion to commander in 2001, although the parties are divided on the chances of potential promotion thereafter to captain. He was unemployed for just over a year in total since discharge, having worked in a number of positions

prior to November 1997 when he became self-employed. His property management company showed a profit of £7,135 (before tax) for the financial year ending in March 1999.

It is also not disputed that the second applicant joined the armed forces in 1989 when he was 18 years old, enlisting for 22 years. In 1991 he became a Weapons Engineering Mechanic (Radio) and on discharge in July 1993 he was in receipt of a gross annual salary of approximately £17,000. While his service prospects were disputed, the Government accepted that, if he had not voluntarily left service, his termination date would likely have been 2011 prior to which he would likely have been confirmed as a Leading Weapons Engineering Mechanic by 2001 and as a Petty Officer Weapons Engineering Mechanic by 2008. Since discharge, he had essentially two sixmonth paid positions prior to his employment by the police in June 1996. He remains in the police force and accepted that his likely promotion to sergeant would mean that his police earnings would probably exceed his potential service earnings by 2003-2004.

26 Moreover, the Court considers significant the loss to the applicants of the non-contributory service pension scheme.

The lump sum and service pension which the first applicant will receive on retirement are substantially less than the amounts he would ***614** have received had he not been discharged, even if he had not achieved his predicted promotions before retirement. Although no precise figures have been provided, the Court accepts that the contributions which would be required in order to achieve an equivalent level of pension from a private pension scheme are likely to be considerable. While the second applicant was able to transfer the accrued benefits of his service pension to the police pension scheme, the latter scheme, unlike the former, is a contributory scheme into which the applicant pays almost 11 per cent of his salary.

The Court is of the view that the applicants can reasonably claim some compensation for the loss associated with the termination of their participation in the non-contributory service pension scheme from the date of their discharges on 17 January 1995 and 28 July 1993, respectively. The amount of the loss is necessarily speculative, depending as it does on, *inter alia,* the period during which the applicants would have remained in service and on their rank at the time of leaving service.

27 The Court further notes that the applicants' claims as regards the promotion bonus and the two open engagement bonuses are not disputed by the Government, and that these payments were to become effective prior to the agreed likely dates of the applicants' retirement from service.

28 Finally, the Court considers that interest can be claimed from the dates on which each element of past pecuniary damage accrued.

29 In such circumstances, and making an award on an equitable basis, the Court awards compensation (inclusive of interest) to the first applicant in the sums of £39,875 in respect of past loss of earnings, £25,000 for future loss of earnings and £30,000 in respect of the loss of the benefit of the non-contributory service pension scheme, making a total award of compensation to the first applicant for pecuniary loss of £94,875.

On the same basis, the Court awards compensation (inclusive of interest) to the second applicant in the sums of £34,000 in respect of past loss of earnings, £7,000 as regards future loss of earnings and £14,000 for the loss of the benefit of the non-contributory service pension scheme, making a total award of compensation to the second applicant for pecuniary loss of £55,000.

C. Costs and Expenses

1. The domestic proceedings

30 The first applicant claims reimbursement of the costs of the domestic judicial review proceedings [FN18] prior to the grant of legal aid in September 1995, in the sum of £30,970.48 (inclusive of VAT).

FN18 See paras 22-23 of the principal judgment.

As well as the costs of the instructing solicitors, invoices were submitted from two Queen's Counsel in the sums of £10,100 and £200 ***615** (exclusive of VAT), respectively. A third (and the leading) Queen's Counsel did not charge the first applicant for work done in the High Court and thereafter his costs were covered by legal aid. The first applicant submitted that the hourly fee charged by his solicitor was towards the lower end of the recommended scale, and that the proceedings were important for his career, raised a matter of public importance and were complex. He states that the Civil Legal Aid (Regulations) 1989 and the Legal Aid Board's Notes for Guidance obliged him to bear a proportionate amount of the costs of those proceedings, even though two other applicants in the same proceedings were legally aided. [FN19]

FN19 See this Court's judgment at para. 2 above.

31 The Government pointed out that the first applicant's domestic proceedings concerned the same matters as those raised in the proceedings brought by the second applicant and by Ms Smith, to whom it was evident at the early stages of the proceedings that legal aid would be granted. Accordingly, the Government submitted that the first applicant should have restricted his legal costs to a minimum. It also argued that the costs charged are unreasonable as to quantum and that no award, or only a small award, should be made.

32 The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention. [FN20]

FN20 See, among other authorities, Nikolova v. Bulgaria: (2001) 31 E.H.R.R. 3, para. 79.

It considers that the applicant was entitled to instruct such lawyers as he chose and it further notes that legal aid regulations also obliged him to bear a proportionate amount of the overall costs of the judicial review proceedings. Nevertheless, the four applicants in those judicial review proceedings were represented by a total of two Queen's Counsel, four junior counsel and three firms of solicitors whereas the issues raised by each applicant were substantially the same. Given the potential for efficient co-ordination between those legal representatives, the charges for the services of the total number of fee earners representing the first applicant cannot all be considered to have been "necessarily incurred" or to be "reasonable as to quantum". [FN21]

FN21 The Observer and the Guardian v. **United Kingdom** (A1216): (1992) 14 E.H.R.R. 153, para. 80.

33 Having regard to the foregoing, and deciding on an equitable basis, the Court awards to the first applicant, in respect of the legal costs and expenses of the domestic judicial review proceedings, the sum of £18,000 (inclusive of VAT).

2. The Convention proceedings

34 The first applicant requested reimbursement of £42,954 (inclusive of VAT) as regards the costs and expenses of the Convention proceedings leading to the principal judgment, and of an estimated ***616** sum of £8,584.16 (inclusive of VAT) in respect of the Article 41 submissions (which includes £2,137.91 for the cost of the Occupational

Psychologist's report). The second applicant claimed £45,567.09 (inclusive of VAT), together with an unspecified sum for the legal costs of the preparation of his Article 41 submissions. Each applicant claimed for the costs of two Queen's Counsel (one Queen's Counsel was common to both applicants) and of a firm of solicitors.

35 The Government accepted some reimbursement of legal costs and expenses. However, it suggested some proportionate reduction to take account of the finding that the complaint under Article 14 of the Convention did not give rise to a separate issue. In addition it argued that the evidence and issues raised in the domestic proceedings largely mirrored those in the Convention proceedings, so that the bulk of the Convention work was done prior to the introduction of the present applications. Both applications, and the applications of Ms Smith and Mr Grady, clearly raised the same issues, yet the present applicants were represented by two different solicitors' firms and in total by three Queen's Counsel. Given the sums claimed for work done by counsel and the latter's experience, the Government submitted that the costs and expenses claimed as regards representation by solicitors were unnecessary and unreasonable as to quantum.

36 The Court considers that its finding that an admissible complaint does not give rise to a separate issue does not, of itself, imply that the associated legal costs were not necessarily incurred or were unreasonable as to quantum. [FN22] This is particularly so when the submissions of the parties on that complaint were not extensive.

FN22 Jordan v. **United Kingdom:** 14 March 2000, para. 42.

In addition, the Court does not accept the Government's contention that the nature of the applicants' submissions to the domestic courts in the judicial review proceedings and to this Court under the Convention were substantially the same. It also recalls that the voluminous

report of the Homosexuality Policy Assessment Team [FN23] was published after the domestic proceedings had terminated. That report formed the basis of the Government's core arguments before this Court in favour of the armed forces' policy against homosexuals [FN24] and was reasonably the subject of substantial submissions by the applicants.

FN23 Described in the principal judgment at paras 51-62.

FN24 See paras 95-99 of the principal judgment.

37 However, the Court considers, in agreement with the Government, that the issues in the applicants' cases were very similar. In addition, by far the greater part of counsels' fees claimed related to the Queen's Counsel common to both applicants who carried out a significant amount of the legal work associated with the Convention proceedings. The Court does not consider that the resulting similarity and overlap between the main written and oral submissions of both applicants has been adequately reflected in the costs claimed by them in respect of that legal representative.

***617** Moreover, and even accepting that the applicants were entitled to be represented by separate firms of solicitors, the Court considers that the costs claimed as regards the work done by the solicitors do not take sufficient account of the similarity of the cases and the potential for efficient co-ordination between those legal representatives.

Furthermore, the form of the applicants' initial Article 41 submissions, together with the general principles expressed therein, were sufficiently similar to indicate that they resulted from substantial co-operation between the legal representatives. Given this, the costs claimed by the first applicant in this respect appear excessively high. The Court has also taken into account in its assessment the fact that the second applicant claimed, but did not specify a particular sum for, the legal costs and expenses of his Article 41

submissions. However, given the similarity between these submissions of the applicants, the Court considers that it can assess the second applicant's costs and expenses in this respect from the sums claimed by the first applicant.

38 Accordingly, the Court concludes that the legal costs and expenses for which the applicants claim reimbursement, pursuant to Article 41 of the Convention, cannot all be considered to have been "necessarily" incurred or to be "reasonable as to quantum". [FN25]

FN25 See The Observer and the Guardian v. **United Kingdom**, loc. cit., para. 80.

39 Taking the above into account, and deciding on an equitable basis, the Court awards £16,000 to the first applicant for the costs and expenses of the Convention proceedings. £15,000 is also awarded to the second applicant in this respect. These sums are inclusive of any VAT which may be chargeable and are to be paid to the applicants less the amounts paid to them by the Council of Europe in legal aid.

D. Default interest

40 According to the information available to the court, the statutory rate of interest applicable in the **United Kingdom** at the date of adoption of the present judgment is 8 per cent per annum.

41 For these reasons, THE COURT

1. *Holds* by six votes to one

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44(2) of the Convention, the following amounts:

-- £19,000 in respect of non-pecuniary damage;

-- £94,875 in respect of pecuniary damage;

-- £18,000 for the costs and expenses of the domestic proceedings (inclusive of value-added tax);

-- £16,000 for the costs and expenses of the proceedings ***618** before the Convention organs (inclusive of value-added tax), less amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8 per cent shall be payable from the expiry of the above-mentioned three months until settlement;

42 2. *Holds* by six votes to one

(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44(2) of the Convention, the following amounts:

-- £19,000 in respect of non-pecuniary damage;

-- £55,000 in respect of pecuniary damage;

-- £15,000 for the costs and expenses of the proceedings before the Convention organs (inclusive of value-added tax), less the amounts paid by the Council of Europe in legal aid to the applicants;

(b) that simple interest at an annual rate of 8 per cent shall be payable from the expiry of the above-mentioned three months until settlement;

43 3. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Partly Dissenting and Partly Concurring Opinion of Judge Loucaides

O-I1 [FN26] I beg to differ from the judgment of the Court on just satisfaction under Article 41 of the

Convention. In that judgment, the majority based their award of compensation to the applicants on all of the violations found in the principal judgment of 27 September 1999. However, my view was that there had not been a violation of Article 8 as a result of the applicants' dismissal from the armed forces on the grounds of their homosexuality. Moreover, that dismissal element was, in my opinion, the most substantial part of the applicants' cases. I cannot, therefore, agree with the Article 41 judgment. Furthermore, I do not think that, in these circumstances, it would serve any useful purpose for me to separately estimate the just satisfaction to award to the applicants for those violations in respect of which I did agree with the majority.

FN26 Paragraph numbers added by publisher.

O-I2 I should, however, add that in my opinion of assessment of non-pecuniary loss in this case should have taken account of the fact that, on their enlistment, the applicants were aware of the risk of the[ir] being discharged from the armed forces on grounds of their homosexuality in pursuance of the relevant official policy of the Ministry of Defence which had been brought to their attention. In so ***619** far as this prior knowledge was not taken into account by the majority, I consider the amount awarded in respect of non-pecuniary loss to be excessive. Even apart from this latter point, I am of the view that the award for non-pecuniary loss is, in any event, excessive.

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No. 04-1434

In the Supreme Court of the United States

ROBERT A. BURT, ET AL., PETITIONERS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Solomon Amendment as amended by Pub. L. No. 108-375, § 552(a), 118 Stat. 1911 (to be codified at 10 U.S.C. 983(b)(1)), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the Solomon Amendment, as applied to the Yale Law School, violates the First Amendment to the Constitution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Forum for Academic and Institutional Rights v. *Rumsfeld*:
219 F. Supp. 2d 269 (D.N.J. 2003) 4
390 F.3d 219 (3d Cir. 2004) 4

Rumsfeld v. *Forum for Academic and Institutional Rights*, cert. granted, No. 04-1152 (May 2, 2005) 2

United States v. *Nixon*, 418 U.S. 683 (1974) 8

United States v. *O'Brien*, 391 U.S. 367 (1968) 7

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 8:
Cl. 1 3
Cl. 12 3
Amend. I 4, 5, 6, 7
Amend. V 4

Statutes and rules—Continues: Page

Act of Oct. 28, 2004, Pub. L. No. 108-375, § 522, 118 Stat. 1911 (to be codified at 10 U.S.C. 983):
10 U.S.C. 983(a) 2
10 U.S.C. 983(b)(1) 2
10 U.S.C. 983(c)(2) 2
10 U.S.C. 983(d)(1) 2
10 U.S.C. 983(d)(2) 3
Fed. R. Civ. P.:
Rule 12(b)(1) 5
Rule 12(b)(6) 5
Rule 56 5
Rule 56(f) 6
Sup. Ct. R. 11 7

Miscellaneous:

Association of American Law Schools Bylaws (1971) 3
Association of American Law Schools Memo. (Aug. 13, 1997) <http://www.aals.org/97-46.html> 3
141 Cong. Rec. 595 (1995) 3
142 Cong. Rec. (1996):
p. 12,712 3
p. 16,860 3
H.R. Rep. No. 443, 108th Cong., 2d Sess. (2004) 3

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OPINIONS BELOW

The opinion of the district court (Pet. App. A1-A59) is reported at 354 F. Supp. 2d 156.

JURISDICTION

The judgment of the district court was entered on January 31, 2005. A notice of appeal was filed by respondent on April 5, 2005. The petition for a writ of certiorari before judgment was filed on April 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners in this case ask the Court to issue a writ of certiorari before judgment to review a district court decision in their favor regarding the constitution-

ality of the Solomon Amendment, Act of Oct. 28, 2004, Pub. L. No. 108-375, § 552(s), 118 Stat. 1191 (to be codified at 10 U.S.C. 983(b)(1)), as applied to Yale Law School. The constitutionality of the Solomon Amendment is already before the Court in *Rumsfeld* v. *Forum for Academic and Institutional Rights*, cert. granted, No. 04-1152 (May 2, 2005) (*FAIR*).

1. The Solomon Amendment provides that specified public funds shall not be provided to an "institution of higher education," or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. 983(a) and (b)(1). The Solomon Amendment does not demand a fixed level or degree of access; it simply asks the institution to provide military recruiters with equal access relative to what the institution provides to other employers. The Solomon Amendment does not mandate equal access, but instead conditions federal funds on equal access, so that the institution cannot deny equal access and simultaneously receive the specified federal funds.

The Solomon Amendment applies to all institutions of higher education except ones with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. 983(c)(2). The Act governs all funds made available through the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, the Central Intelligence Agency, and other enumerated agencies. 10 U.S.C. 983(d)(1). The Act does not apply to funds provided to educational institutions or individuals "solely for student

financial assistance, related administrative costs, or costs associated with attendance." 10 U.S.C. 983(d)(2).

The Solomon Amendment was enacted in furtherance of Congress's authority under Article I of the Constitution to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12. The Solomon Amendment is also an exercise of Congress's authority, under the Spending Clause, to "provide for the common Defence and general Welfare of the United States." *Id.* Art. I, § 8, Cl. 1. The Solomon Amendment reflects Congress's judgment that restrictions on military recruiting at colleges and universities interfere with "the Federal Government's constitutionally mandated function of raising a military." 141 Cong. Rec. 595 (1995) (Rep. Solomon); 142 Cong. Rec. 16,860 (1996) (Rep. Solomon); *id.* at 12,712 (Rep. Goodlatte). It also reflects Congress's judgment that *equal* access is critical to effective military recruiting. See H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004) ("Successful recruitment relies heavily on the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers.").

2. Since 1990, the Association of American Law Schools (AALS) has required its members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate on the basis of sexual orientation or other specified criteria. AALS Bylaws §§ 6-4(b), 6.19 (1971). Following enactment of the Solomon Amendment, the AALS excused members from complying with that policy if they took steps to "ameliorate" the perceived impact of military recruiting on the student body. See AALS Memorandum 97-46 (Aug. 13, 1997) <http://www.aals.org/97-46.html>. In

response, most law schools allowed military recruiters to enter their campuses, but many law schools refused to provide military recruiters with the same access that they offered to other employers. The Department of Defense subsequently clarified that the Solomon Amendment conditions federal funding on equal access, and notified law schools that the failure to provide equal access could jeopardize their federal funds.

3. In September 2003, organizations representing more than two dozen law schools or law school faculties, and 900 faculty members (the *FAIR* plaintiffs) brought suit in the United States District Court for the District of New Jersey to challenge the constitutionality of the Solomon Amendment. The *FAIR* plaintiffs claimed, *inter alia*, that the Solomon Amendment violates the First Amendment and Fifth Amendment, both on its face and as applied.

The district court denied the *FAIR* plaintiffs' motion for a preliminary injunction, holding that they were unlikely to prevail on any of their constitutional claims. *Forum for Academic and Institutional Rights, Inc.* v. *Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003). On appeal, a divided panel of the Third Circuit reversed. *Forum for Academic and Institutional Rights, Inc.* v. *Rumsfeld*, 390 F.3d 219 (2004). The panel majority held that the *FAIR* plaintiffs are likely to prevail on their claim that the Solomon Amendment violates the First Amendment. Based on that holding, the panel directed the district court to enter a preliminary injunction against enforcement of the Solomon Amendment. *Id.* at 246.

The government petitioned this Court for a writ of certiorari to review the court of appeals' decision regarding the constitutionality of the Solomon Amendment. The Court granted the government's petition on

May 2, 2005 (No. 04-1152), and the government's opening brief is due on July 18, 2005.

4. This case involves a challenge to the constitutionality of the Solomon Amendment as applied to Yale Law School. Until 2002, Yale Law School maintained a policy of denying the services of its Career Development Office to employers that take account of sexual orientation in hiring decisions. Pet. App. A15-A16, A20-A21. In 2002, the law school's faculty voted to suspend the application of the non-discrimination policy to military recruiters in order to avoid possible loss of federal funding under the Solomon Amendment. *Id.* at A22.

In October 2003, members of the faculty of Yale Law School (petitioners) filed suit in the United States District Court for the District of Connecticut against Donald H. Rumsfeld, the Secretary of Defense. They alleged that the application of the Solomon Amendment to the law school and its parent institution, Yale University, violates the First Amendment. Petitioners sought an injunction prohibiting the application of the Solomon Amendment to the law school and university on the basis of the law school's suspended recruiting policy.

The government moved to dismiss the complaint under Rule 12(b)(1) for lack of standing and lack of ripeness, and also moved to dismiss petitioners' constitutional claims under Rule 12(b)(6) for failure to state a claim. In June 2004, the district court denied the motion to dismiss on standing and ripeness grounds and reserved the government's Rule 12(b)(6) motion. Pet. App. C1-C20.

Petitioners thereafter moved for summary judgment under Rule 56. At the time of the motion, the government had not yet had the opportunity to engage in any discovery on petitioners' factual allegations. Acting pur-

suant to Rule 56(f), the government therefore asked to be allowed to conduct discovery before the district court acted on petitioners' motion. The government also opposed the motion on its merits.

On January 31, 2005, the district court issued a memorandum order granting petitioners' motion for summary judgment on First Amendment grounds. Pet. App. A1-A59. The district court declared the Solomon Amendment unconstitutional as applied, and enjoined the government from enforcing it against Yale University based on Yale Law School's denial of equal access to military recruiters. *Id.* at A59.

As a threshold matter, the court rejected the government's request for discovery under Rule 56(f). The court acknowledged that "the grant of summary judgment prior to discovery is not to be undertaken lightly," but nevertheless denied the government the opportunity to conduct discovery. Pet. App. A7; *id.* at A6-A15.

On the merits, the district court held that the Solomon Amendment interferes with petitioners' freedom of speech by compelling the law school to disseminate a recruiting message with which it disagrees and by interfering with the law school's ability to convey its own message. Pet. App. A33-A41. The court further held that the Solomon Amendment intrudes on petitioners' First Amendment right of freedom of association. *Id.* at A46-A55. Applying strict scrutiny, the court held that the government had not shown that the application of the Solomon Amendment to Yale Law School materially advances the government's military recruiting goals or that the Amendment is the least restrictive means of achieving those goals. *Id.* at A44-A46, A54-A55.

ARGUMENT

Petitioners seek certiorari before judgment on the question whether the Solomon Amendment violates the First Amendment. Rule 11 of this Court provides that a petition for a writ of certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Because the present petition does not satisfy that standard, the petition for a writ of certiorari before judgment should be denied.

1. The constitutionality of the Solomon Amendment under the First Amendment is already before this Court in *FAIR*. That case presents the crucial legal questions that will determine the constitutionality of the Solomon Amendment. In particular, that case presents the questions whether (1) the Solomon Amendment infringes on a law school's freedom of expressive association, (2) the Solomon Amendment unconstitutionally compels the recipient schools themselves to speak, (3) the Solomon Amendment triggers heightened scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968), because it interferes with expressive conduct, (4) a specific evidentiary showing of the effectiveness of on-campus recruiting is necessary to satisfy the *O'Brien* standard, and (5) the Solomon Amendment's status as Spending Clause legislation affects the constitutional analysis. If the Court agrees with the government's position in *FAIR*, the Solomon Amendment will be sustained. Because *FAIR* already presents the crucial legal issues that will determine the constitutionality of the Solomon Amendment, there is no reason for the Court to grant review in another case involving the constitutionality of the Solomon